No. 16-992

Title:	Marisa N. Pavan, et al., Petitioners v. Nathaniel Smith
Docketed:	February 13, 2017
Lower Ct:	Supreme Court of Arkansas
Case Nos.:	(CV-15-988)
Decision Date:	December 8, 2016

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Feb 13 2017	Petition for a writ of certiorari filed. (Response due March 15, 2017)
Feb 24 2017	Order extending time to file response to petition to and including April 14, 2017.
Mar 15 2017	Brief amicus curiae of Constitutional Accountability Center filed.
Mar 15 2017	Motion for leave to file amici brief filed by Lambda Legal Defense and Education Fund, Inc., et al.
Mar 15 2017	Motion for leave to file amici brief filed by Family Equality Council, et al.
Mar 15 2017	Motion for leave to file amici brief filed by Family Law Professors.
Apr 14 2017	Brief of respondent Nathaniel Smith in opposition filed.
May 1 2017	Reply of petitioners Marisa N. Pavan, et al. filed.
May 2 2017	DISTRIBUTED for Conference of May 18, 2017.
May 22 2017	DISTRIBUTED for Conference of May 25, 2017.
May 22 2017	Record Requested.
May 23 2017	Record received from the Supreme Court of Arkansas. The record is electronic.
May 30 2017	DISTRIBUTED for Conference of June 1, 2017.
Jun 5 2017	DISTRIBUTED for Conference of June 8, 2017.
Jun 12 2017	DISTRIBUTED for Conference of June 15, 2017.
Jun 19 2017	DISTRIBUTED for Conference of June 22, 2017.
Jun 26 2017	Motion for leave to file amici brief filed by Family Equality Council, et al., GRANTED.
Jun 26 2017	Motion for leave to file amici brief filed by Family Law Professors GRANTED.
Jun 26 2017	Motion for leave to file amici brief filed by Lambda Legal Defense and Education Fund, Inc., et al. GRANTED.
Jun 26 2017	Petition GRANTED. Judgment REVERSED and CASE REMANDED. Opinion per curiam. (Detached Opinion). Justice Gorsuch, with whom Justice Thomas and Justice Alito join, dissenting. (Detached Opinion).
Jul 28 2017	MANDATE ISSUED.
Jul 28 2017	JUDGMENT ISSUED.

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RECORD AND BRIEFS

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No. _____

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In the Supreme Court of the United States

MARISA N. PAVAN, ET AL., PETITIONERS

v.

NATHANIEL SMITH, M.D., MPH

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2601 (2015), this Court held that, under the Fourteenth Amendment, States must recognize and give equal effect to marriages between same-sex spouses with respect to all "aspects of marital status" under state law, including with respect to "birth and death certificates." Under Arkansas law, when a married woman gives birth, her husband must be listed as the second parent on the child's birth certificate, including when he is not the child's genetic parent because the child was conceived by artificial insemination. The Supreme Court of Arkansas held below that, notwithstanding *Obergefell*, Arkansas may deny this right to married same-sex couples. Every other court to consider this question has held to the contrary. The question presented is:

Whether a State violates the Fourteenth Amendment by denying married same-sex couples the same right afforded to married opposite-sex couples under state law to have the name of the birth mother's spouse entered as the second parent on their child's birth certificate.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

The following list provides the names of all parties to the proceedings below:

Petitioners Marisa Pavan, Terrah Pavan, Leigh D.W. Jacobs, and Jana Jacobs were the appellees in the Arkansas Supreme Court. Courtney Kassel and Kelly Scott were also appellees in the Arkansas Supreme Court but are not petitioners.

Respondent Nathaniel Smith, in his official capacity as Director of the Arkansas Department of Health, was the appellant in the Arkansas Supreme Court.

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In the Supreme Court of the United States

No. _____

MARISA N. PAVAN, ET AL., PETITIONERS

v.

NATHANIEL SMITH, M.D., MPH

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR A WRIT OF CERTIORARI

Petitioners Marisa N. Pavan, Terrah D. Pavan, Leigh D.W. Jacobs, and Jana S. Jacobs respectfully petition for a writ of certiorari to review the judgment of the Arkansas Supreme Court.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court (App., *infra*, 1a-25a) is reported at --- S.W.3d ---, 2016 WL 7156529. The opinion of the Circuit Court of Pulaski County, Arkansas, (App., *infra*, 48a-66a) is unreported.

JURISDICTION

The judgment of the Arkansas Supreme Court was entered on December 8, 2016. This Court has jurisdiction pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution is reproduced at App., *infra*, 73a. Arkansas Code Section 20-18-401 is reproduced at App., *infra*, 76a-79a.

STATEMENT OF THE CASE

Petitioners are two married same-sex couples who each live in Arkansas with their children. Like many opposite-sex couples, petitioners conceived their children through anonymous sperm donation. For children born to married opposite-sex parents, Ark. Code § 20-18-401 (the Birth Certificate Law) requires the birth mother's husband to be listed on the birth certificate regardless of whether he is genetically related to the child. The State conceded on appeal that it had no rational basis to apply the Birth Certificate Law differently to similarly situated same-sex and opposite-sex couples. Nonetheless, the Arkansas Supreme Court held that the State may refuse to place a birth mother's female spouse on their child's birth certificate because she is not a biological parent. The court acknowledged this Court's decision in *Obergefell*, but construed that decision very narrowly, concluding that it addressed only the right of same-sex couples to marry and does not require equal treatment of same-sex spouses under State laws regarding the issuance of birth certificates to married parents. In so holding, the Arkansas Supreme Court departed from every other court to consider whether *Obergefell* requires that state birth certificate laws must be applied equally to same-sex and opposite-sex spouses. If permitted to stand, that extraordinary ruling will undermine *Obergefell* and invite

other States to deny marital rights and protections selectively to married same-sex couples, once again subjecting them to an official regime of disfavored treatment and stigma.

A. Arkansas's Birth Certificate Law

Like other states, Arkansas provides that birth certificates be issued to children born within the state. Ark. Code § 20-18-401(a). In Arkansas, as in other states, a birth certificate is a legal document that identifies a child's legal or presumed parents, who may or may not be the child's genetic parents. Thus, under Arkansas law, there are a variety of circumstances in which a birth certificate lists parents who are not genetically related to the child.

Of particular relevance here, Arkansas law has long provided that when a child is born to a mother "married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child." Ark. Code § 20-18-401(f)(1). That requirement is mandatory, applying in all cases in which a child is born to a married woman, regardless of whether the husband is the child's biological father. *Ibid.* There are only two narrow exceptions to that categorical rule: (1) when a court of competent jurisdiction has determined that another man is the child's legal father; or (2) if the "mother," "husband," and "putative father" each execute affidavits that the "husband is not the father" and "the putative father is the father." *Id.* § 20-18-401(f)(1)(A) and (B).

Once a husband's name has been entered on the birth certificate, even when another man is or claims to be a child's biological father and seeks to assert legal

parentage, the husband's presumption of legal parentage cannot be rebutted, and the husband cannot be removed from the child's birth certificate, except under extremely narrow circumstances. The putative biological father must "show that rebutting that presumption is in the best interest of a child whose parents" may "remain married and plan to continue as the only parents the child has ever known." *R.N.* v *J.M.*, 61 S.W.3d 149, 155 (Ark. 2001); see also *Martin* v. *Pierce*, 257 S.W.3d 82, 87 (Ark. 2007) (rejecting former husband's attempt to disestablish paternity of marital child based on genetic testing, in order to avoid child support, in light of "the interests of the state, the family, and the child in maintaining the continuity, financial support, and psychological security of an established parent-child relationship").

Arkansas law also expressly provides that when a married couple uses donor insemination to have a child, the child is "deemed the legitimate natural child of * * * the woman's husband," and the husband is the child's legal father. Ark. Code § 9-10-201(a). In such cases, the husband is placed on the child's birth certificate at the time of the child's birth, as directed by the Birth Certificate Law, *id.* § 20-18-401(f)(1)(A) and (B), and the husband's legal parentage cannot be challenged or disavowed based on his lack of a genetic connection to the child. See, *e.g.*, *Brown* v. *Brown*, 125 S.W.3d 840 (Ark. Ct. App. 2003) (holding that husband who, through his conduct, consented to have a child through donor insemination was estopped from seeking to disavow paternity when the parties divorced).

In addition, when a child who is born in Arkansas is adopted, the State issues "a new certificate of birth" that names the adoptive parents as the child's legal

parents. Ark. Code § 20-18-406(a)(1). That birth certificate must be indistinguishable from an original. It is not to be marked "amended," Code Ark. R. 007.12.1-5.5(a), and the original certificate is kept under seal. See Ark. Code § 20-18-406(b). A child with such a birth certificate would have no indication that there is an original record somewhere identifying his or her biological parents, nor would anyone else.

Finally, when a child's genetic parents are not married to one another, Arkansas law permits the biological father to be listed on the birth certificate only if both biological parents (and the mother's spouse, if any) file affidavits to establish the biological father's parentage. Ark. Code § 20-18-401(f)(2). Thus, the birth certificates of children conceived by unmarried couples are not required to, and in some circumstances do not, include the child's genetic father.

In sum, under Arkansas law, there are a variety of circumstances in which a child's legal parents are not the child's genetic parents. In such cases, including for children born to married opposite-sex parents through anonymous sperm donation, the parents named on the child's birth certificate are not both genetically related to the child.

B. The Importance Of Birth Certificates

A birth certificate serves many important legal and practical functions. Indeed, a birth certificate is "the only common governmentally-conferred, uniformly-recognized, readily-accepted record that establishes identity, parentage, and citizenship, and it is required in an array of legal contexts." *Henry* v. *Himes*, 14 F. Supp. 3d 1036, 1050 (S.D. Ohio), rev'd sub nom. *DeBoer* v. *Snyder*, 772 F.3d 388 (6th Cir. 2014), rev'd sub nom.

Obergefell v. *Hodges*, 135 S. Ct. 2584 (2015). Especially for minor children and their parents, but also continuing throughout the child's life, it is among the most critical government-issued records.

A child's birth certificate affects parental decision-making authority in the medical and educational context. For example, some Arkansas public schools allow only those parents named on the child's birth certificate to receive educational information absent a court order. See *Bryant Pub. Schools Student Handbook* 14, http://bryantschools.org/system/files/documents/570/Elementary%20Handbook%202016-17.pdf. Should the family move to another state, a birth certificate may be required to enroll the child in a new school. See, *e.g.*, Ohio Rev. Code Ann. § 3313.672(A)(1). Parents who are not listed on their child's birth certificate also have "extra reason to dread medical emergencies, fearing that doctors will delay a child's emergency treatment while trying to figure out whether a parent has authority to consent." Shohreh Davoodi, *More Than a Piece of Paper: Same-Sex Parents and Their Adopted Children Are Entitled to Equal Protection in the Realm of Birth Certificates*, 90 Chi.-Kent L. Rev. 703, 709 (2015). Access to various state public benefits also stems from a parent having her name on a child's birth certificate. See, *e.g.*, Ark. Code § 24-12-117(b) (requiring birth certificate to apply for survivor benefits for certain public officers and employees); Code Ark. R. 208.00.1-2212 (birth certificate serves as proof of parental relationship when applying for Transitional Employment Assistance).

Birth certificates issued under state law also have importance under federal law. For example, birth certificates enable parents to verify their relationship to

minor children. See, *e.g.*, 20 C.F.R. 401.45(b)(6); 31 C.F.R. 1.34; 45 C.F.R. 5b.5(b)(2)(iii). Similarly, a parent's ability to obtain a passport for a minor child is affected by the child's birth certificate. See 22 C.F.R. 51.28(a)(2) and (3)(ii)(A); U.S. Dep't of State, *Children Under 16*, https://travel.state.gov/content/passports/en/passports/under-16.html#consent.

Beyond the many legal and practical difficulties it imposes on married same-sex couples and their children, Arkansas' refusal to list both spouses on their child's birth certificate causes those children to "suffer the stigma of knowing their families are somehow lesser." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2600 (2015). The children will face this stigma throughout their lives, as they look to and use their birth certificates as an official record of their own identity and the identity of their parents. "The inability to obtain an accurate birth certificate saddles the child with the life-long disability of a government identity document that does not reflect the child's parentage and burdens the ability of the child's parents to exercise their parental rights and responsibilities." *Henry*, 14 F. Supp. 3d at 1050.

C. Factual Background

Petitioners Marisa and Terrah Pavan were legally married in New Hampshire in 2011. Ark. S. Ct. Add. 2. The Pavans were living in Arkansas in 2015 when Terrah gave birth to a baby girl. *Ibid.* Marisa and Terrah jointly planned their daughter's conception, and arranged and paid for an anonymous sperm donor. *Ibid.* Terrah and Marisa's daughter, T.R.P., was born on May 15, 2015, at the University of Arkansas for Medical Sciences Hospital in Little Rock. *Ibid.* Marisa and Terrah completed the application to receive a birth cer-

tificate at the hospital when their daughter was born, listing both women as parents on the application. *Ibid.* However, when the Arkansas Department of Health (Department) issued the child's birth certificate, it did not list Marisa's name on the birth certificate and listed Terrah as the only parent. *Ibid.*

Petitioners Leigh and Jana Jacobs were legally married in Iowa in 2010. Ark. S. Ct. Add. 2-3. They live in Arkansas, which is where Leigh gave birth to their son, F.D.J., on June 26, 2015. Ark. S. Ct. Add. 3. As with the Pavans, both parents arranged and paid for an anonymous sperm donor. *Ibid.* And as with the Pavans, despite the parents' request that they both be placed on the birth certificate, they were issued a birth certificate listing only the birth parent (Leigh) on their son's birth certificate. *Ibid.*

D. Procedural Background

1. Complaint and state circuit court decision

Petitioners filed suit seeking declaratory and injunctive relief on July 13, 2015, in the Circuit Court of Pulaski County, Arkansas, alleging that the Department's refusal to provide birth certificates for petitioners' children naming both spouses as parents violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution. Ark. S. Ct. Add. 8-10. Petitioners also sought a declaration that, for the same reasons, the Birth Certificate Law, Ark. Code § 20-18-401, must be interpreted to apply equally to same-sex and opposite-sex married couples. Petitioners brought their complaint against respondent Nathaniel Smith in his official capacity as the Director of the Department.

The parties filed cross-motions for summary judgment. On November 23, 2015, after hearing argument, the circuit court issued an order from the bench requiring respondent "to immediately issue amended certificates of birth" to petitioners, see App., *infra*, 48a, which was followed by a memorandum opinion to that effect on December 1, 2015, App., *infra*, 48a-66a. The circuit court held that, under *Obergefell*, the provisions in the Birth Certificate Law directing that the "husband" of a birth mother "shall" be listed on the birth certificate needed to be invalidated to ensure that same-sex married couples have "the same spousal benefits * * * available to every opposite-sex married couple." *Id.* at 59a-62a.[1]

Respondent moved for a stay, which the circuit court denied. App., *infra*, 67a-72a.

2. Respondent's appeal to the Arkansas Supreme Court

Respondent appealed to the Arkansas Supreme Court, which agreed to hear the case. At oral argument before the Arkansas Supreme Court, respondent conceded for the first time that the State has no legitimate basis for applying the Birth Certificate Law differently to married same-sex couples who have children

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[1] The circuit court first held that the issues before the court had been litigated in a previous case, *Wright* v. *Smith*, 60CV-13-2662, appeal dismissed sub nom. *Smith* v. *Wright*, 2015 Ark. 298 (2015) (per curiam), and that the Department was bound by *res judicata* to issue birth certificates to the children of married same-sex couples listing both spouses as parents. App., *infra*, 52a-53a. The Arkansas Supreme Court rejected that holding, and Petitioners do not seek review of that holding here.

through donor insemination than to opposite-sex couples who have children through donor insemination: "We would agree that this differential treatment fails equal protection under the plain old rational basis standard." *Id.* at 82a. The State conceded that, under *Obergefell*, Arkansas's law that when a married couple uses donor insemination to have a child, they are both legal parents, must be applied equally to same-sex spouses. *Id.* at 82-83a. The State also conceded that in such a case both the birth mother and her spouse "would be entitled to be placed on the birth certificate initially when they were at the hospital and through the hospital's submission to the Department of Health." *Id.* at 83a.

3. The decision of the Arkansas Supreme Court

Despite the State's concession during oral argument that its "differential treatment [of married same-sex couples] fails equal protection under the plain old rational basis standard," App., *infra*, 82a, a divided Arkansas Supreme Court held that the State could permissibly treat married same-sex parents differently under the Birth Certificate Law, based on the absence of a genetic connection between both parents and the child.[2] Based on that conclusion, the court held that

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[2] Although the State did not object to the specific relief already granted to the named plaintiffs, namely, the issuance of birth certificates listing both parents, App., *infra*, 4a, the Arkansas Supreme Court exercised jurisdiction over the appeal to resolve the facial constitutionality of the Birth Certificate Law. Because the Arkansas Supreme Court held that Arkansas law does not permit a birth mother's same-sex spouse to be listed as a parent on an original birth certificate, the Arkansas Department of

when a married woman gives birth to a child, the Birth Certificate Law must be enforced as written, so that only a "husband" may be listed as a second parent on the original birth certificate. *Id.* at 16a-22a.

The court acknowledged this Court's decision in *Obergefell*, but held that it applied only to the right to marry and did not require States to apply state laws regarding the issuance of birth certificates equally to married same-sex and opposite-sex couples. App., *infra*, 11a (holding that *Obergefell* "did not address Arkansas's statutory framework regarding birth certificates, either expressly or impliedly"); see also *id.* at 14a-15a (holding that applying the Birth Certificate Law only to "husbands" "does not run afoul of *Obergefell*").

The court rejected Petitioners' claim that enforcing the Birth Certificate Law to discriminate against same-sex spouses violated the requirement of due process, including by infringing upon their right to marry and to the protections and benefits of marriage. The court held that same-sex couples' fundamental right to marry and to be recognized as legal parents does not encompass the right to have both parents listed on their child's birth certificate, finding that "the circuit court * * * conflated distinct categories of marriage, parental rights, and vital records." App., *infra*, 20a. The court

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Health is barred from doing so, and the validity of the birth certificates previously issued to Petitioners is uncertain. In addition, one of the petitioner couples is again expecting a child, and the birth mother's spouse—like many other similarly situated same-sex spouses throughout the state—again seeks recognition of her right under state law, when the child is born, to be listed as the child's parent on the birth certificate.

held that, even if a same-sex spouse is a legal parent, she has no due process right to be listed on her child's birth certificate: "[W]e cannot say that naming the nonbiological spouse on the birth certificate of the child is an interest of the person so fundamental that the State must accord the interest its respect * * * ." *Id.* at 20a.

The court also rejected Petitioners' claims that treating them differently than similarly situated opposite-sex spouses denied them the equal protection of the laws. The court held that permitting only "husbands" to be listed on birth certificates passed intermediate equal protection review because, in the court's view, "[i]t does not violate equal protection to acknowledge basic biological truths." App., *infra*, 21a. Citing an affidavit from Arkansas's registrar of vital records, the court found that "the challenged classification serves an important government objective—tracing public-health trends and providing critical assistance to an individual's identification of personal health issues and genetic conditions." *Id.* at 22a. The Court also found that "the means employed—requiring the mother and father [of the child] on the birth certificate to be biologically related to the child—are substantially related to the achievement of those objectives." *Ibid.*

The court acknowledged Arkansas's law providing that a husband is the legal father of a child born to his wife through donor insemination, despite having no genetic connection to the child, Ark. Code § 9-10-201(a), but held that statute to be irrelevant to the constitutionality of the Birth Certificate Law. App., *infra*, 22a-23a. The court also deemed irrelevant the State's concession that the donor insemination statute had to be

applied equally to same-sex spouses and that the State had no rational basis for treating same-sex spouses differently than opposite-sex spouses under the Birth Certificate Law. *Ibid.*[3]

Three Justices issued separate opinions, each of which concluded that preventing the issuance of birth certificates listing both same-sex spouses as their children's parents, on equal terms with the issuance of birth certificates to opposite-sex spouses, violates *Obergefell* and denies married same-sex couples due process and equal protection.

Chief Justice Brill, concurring in part and dissenting in part, would have affirmed the circuit court's holding that the Birth Certificate Law must be applied equally to same-sex couples. Noting this Court's holding in *Obergefell* that "same-sex couples may not be denied 'the constellation of benefits that the States have linked to marriage,'" Chief Justice Brill found that "[t]he right to a birth certificate is a corollary to the right to a marriage license." App., *infra*, 28a. In his view, *Obergefell* requires that "a same-sex married couple is entitled to a birth certificate on the same basis as an opposite-sex married couple." *Ibid.*

Justice Wood also concurred in part and dissented in part. Like Chief Justice Brill, she recognized that, under *Obergefell*, "states cannot constitutionally deny

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[3] The court also rejected a claim by a same-sex couple who had not been married at the time of their child's birth but married shortly after the decision in *Obergefell*, who sought an amended birth certificate. That couple has subsequently established the non-birth parent's rights through adoption proceedings and therefore does not seek further review by this Court.

same-sex couples the benefits of marital status, which include equal access to birth certificates." App., *infra*, 40a. However, based on the State's concessions at argument, which suggested that the State might agree to start issuing birth certificates listing both same-sex spouses as parents, Justice Wood would have remanded the case to the circuit court to further explore that possibility and "to give the legislature time * * * to amend the birth-certificate statutes to comply with *Obergefell*." *Ibid.*

Justice Danielson would have affirmed the circuit court's decision in its entirety based on *Obergefell* as well as on a prior Arkansas state court decision striking down Arkansas's marriage ban. App., *infra*, 41a-42a. Justice Danielson explained that, under *Obergefell*, "states are not free to deny same-sex couples 'the constellation of benefits that the States have linked to marriage,'" *id.* at 43a (quoting *Obergefell*, 135 S.Ct. at 2601), and noted that this Court identified birth certificates "specifically as one of those benefits." *Id.* at 43a. Further, Justice Danielson highlighted that *Tanco* v. *Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014), rev'd sub nom. *Deboer* v. *Snyder*, 772 F.3d 388 (6th Cir. 2014), "one of the cases on review in *Obergefell*," "involved a same-sex married couple" who "challenged the Tennessee law providing that their child's nonbiological parent would not be recognized as the child's parent" on the birth certificate, "which affected various legal rights." App., *infra*, 43a.

As further support, Justice Danielson noted that the right to marry must apply with equal force to same-sex couples, in part, because marriage "'safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and educa-

tion,'" and that this emphasis on "the protection of children and the stability of the family unit was a foundation for the Court's decision." App., *infra*, 43a-44a (quoting *Obergefell*, 135 S. Ct. at 2600).

Justice Danielson therefore disagreed with the court's conclusions "that the right to be named as a parent on a birth certificate is not a benefit associated with marriage" under Arkansas law. App., *infra*, 44a-45a. He also rejected the majority's contention that "the specific statutes at issue here focus on biological relationships rather than marital ones," noting that the Birth Certificate Law "provides that the name of the 'husband' of the mother shall be entered on a birth certificate as the father of the child, without regard to any biological relationship and on the sole basis of his marriage to the mother." *Id.* at 45a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH *OBERGEFELL* v. *HODGES* AND *UNITED STATES* v. *WINDSOR*

In *Obergefell* v. *Hodges*, this Court held that, consistent with the requirements of the Fourteenth Amendment, states may not deprive same-sex couples of the fundamental right to marry, including the right to participate in the benefits and responsibilities of marriage to the same extent and on equal terms as opposite-sex couples. 135 S. Ct. 2584 (2015). In *United States* v. *Windsor*, this Court held that a federal law denying equal recognition and protection to married same-sex couples impermissibly relegated them to a "second-tier marriage." 133 S. Ct. 2675, 2694 (2013). Arkansas law provides that when a child is born to a married mother, the "husband['s]" name "shall be en-

tered" on the birth certificate. That requirement is mandatory and applies regardless of whether the husband is genetically related to the child. The Arkansas Supreme Court held that same-sex couples may be denied this vital benefit of marriage. That decision merits this Court's review because it directly conflicts with this Court's decisions in *Obergefell* and *Windsor* and, if permitted to stand, renders those decisions hollow by permitting states to once again relegate same-sex couples and their families to the stigma, injury, and inequality of "second-tier" status. *Obergefell*, 135 S. Ct. at 2600-2601; *Windsor*, 133 S. Ct. at 2694.

A. *Obergefell* Held That Married Same-Sex Couples Are Entitled To The Same "Constellation Of Benefits" Of Marriage As Married Opposite-Sex Couples, Including The Listing of Both Spouses As Parents On A Birth Certificate

1. Obergefell *and* Windsor *provide that the government may not discriminate within the institution of marriage*

"[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, couples of the same-sex may not be deprived of that right and that liberty." *Obergefell*, 135 S. Ct. at 2604. This Court emphasized that marriage is the "basis for an expanding list of governmental rights, benefits, and responsibilities," on both the state and federal level. *Id.* at 2601. In *Turner* v. *Safley*, the Court acknowledged that "marital status often is a precondition to the receipt of [government] benefits * * *

property rights * * * and other, less tangible benefits." 482 U.S. 78, 96 (1987).

Because the legal protections of marriage—and particularly those related to children—are so central to the institution, a state violates that fundamental right when it selectively denies some or all of those protections to same-sex married couples. As the Court has observed, a marriage shorn of those aspects of marital status is a "marriage" in name only, which "demeans the couple" and "diminish[es] the stability and predictability of basic personal relations." *Windsor*, 133 S. Ct. at 2694.

Whether a same-sex couple receives the legal protections associated with marriage goes to the very heart of this Court's holding in *Obergefell*. Marriage is "at the center of many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle, yet same-sex couples [were being] denied the constellation of benefits that the States have linked to marriage." *Obergefell*, 135 S. Ct. at 2590. This Court expressly rejected an approach under which "determination of the required availability of specific public benefits to same-sex couples" would be determined on a "case-by-case" basis, because such an incremental approach "would deny gays and lesbians many rights and responsibilities intertwined with marriage." *Id.* at 2606.

This Court's opinion in *Windsor* likewise rejected the unequal treatment of married same-sex and opposite-sex couples. In invalidating Section 3 of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (DOMA), this Court explained that the statute's infirmity arose because its "principal effect is to identi-

fy a subset of state-sanctioned marriages and make them unequal." *Windsor*, 133 S. Ct. at 2694. The Due Process and Equal Protection Clauses did not permit the "creat[ion of] two contradictory marriage regimes within the same State." *Ibid.* DOMA's effect of treating some marriages differently from others impermissibly "place[d] same-sex couples in an unstable position of being in a second-tier marriage." *Ibid.* The Arkansas Supreme Court's decision has a similar effect here. By denying married same-sex couples one of the most important protections given to other married couples, the court's decision has relegated those couples to the same "second-tier status" this Court has twice held to be an unconstitutional denial of their right to equal liberty, dignity, and protection of the laws.

Obergefell and *Windsor* demonstrate that the Constitution does not countenance denying lawfully married same-sex couples any aspect of the legal protections that are premised upon marital status. Although states are generally able "to vary the benefits they confer on all married couples," *Obergefell*, 135 S. Ct. at 2601, they cannot give benefits to opposite-sex married couples while denying them to similarly situated same-sex couples. To permit states to pick and choose which marital protections married same-sex couples and their children may enjoy, based on the same rationales used to justify their exclusion from marriage in the past, would undermine this Court's precedent and return these families to a caste-like position of official stigma and disfavor.

2. This Court has identified the issuance of birth certificates as one of the "constellation of benefits" that must be afforded equally to same-sex married couples

In *Obergefell*, this Court expressly identified the issuance of birth certificates as one of the "governmental rights, benefits, and responsibilities" that states have made part of the "constellation of benefits" of marriage. In recounting those benefits, the Court stated clearly that the "aspects of marital status include * * * birth and death certificates." *Obergefell*, 135 S. Ct. at 2601.

Obergefell's reference to birth certificates as an aspect of marital status was deliberate and central to both the facts and the holding in that case. Several of the petitioner couples in *Obergefell* presented this very issue. As one example, *Henry* v. *Himes* involved same-sex married couples who sought to be listed on their children's birth certificates. Three of the couples had children using anonymous sperm donors. 14 F. Supp. 3d 1036, 1041-1042 (S.D. Ohio), rev'd sub nom. *DeBoer* v. *Snyder*, 772 F.3d 388 (6th Cir. 2014), rev'd sub nom. *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015). In each case, the couples planned the conception and sought to raise a family together, yet in each case, Ohio would list only the birth mother as the child's parent on the birth certificate. *Ibid.* So too, in *Tanco* v. *Haslam*, one of the reasons that Valeria Tanco and Sophy Jesty sought to have their marriage recognized by the State of Tennessee was so that, when Dr. Tanco gave birth to their daughter, both parents would be listed on the birth certificate, as would be the case if Dr. Jesty were a man. 7 F. Supp. 3d 759, 764 (M.D. Tenn. 2014), rev'd sub nom. *DeBoer* v. *Snyder*, 772 F.3d 388 (6th Cir. 2014), rev'd sub nom. *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015). Those *Obergefell* petitioners were in precisely the same situation as petitioners here: they were legally married couples who had given birth while married but were

denied the right granted opposite-sex couples under state law to have both parents listed on their children's birth certificates. Those *Obergefell* petitioners sought, *and this Court upheld*, their equal right to have a female non-birth spouse listed as a parent on their children's birth certificates as was provided to male non-birth spouses under state law. *Obergefell*, 135 S. Ct. at 2601-2602, 2608.

In short, *Obergefell* and *Windsor* make clear that the protection of marital status guaranteed by the Fourteenth Amendment includes equal access to the rights and benefits of marriage. Included among these is the right of a married couple to be included on their child's birth certificate—to the same extent as that right is afforded opposite-sex couples under state law.

B. The Arkansas Supreme Court's Unequal Treatment Of Married Same-Sex Couples Cannot Be Justified Based On The Same Rationale Rejected In *Obergefell* And *Windsor*

As a consequence of the decision below, Arkansas treats opposite-sex spouses and same-sex spouses differently. In an attempt to justify that unequal treatment, the Arkansas Supreme Court cited the same rationale previously used to justify state laws excluding same-sex couples from the right to marry—namely, their inability to procreate a child that is genetically related to both parents. The State may refuse to list a birth mother's female spouse on the child's birth certificate, the court held, because she is not genetically related to the child. According to the court, such a rule is permissible because it advances important state interests related "to an individual's identification of personal health issues and genetic conditions." App., *infra*, 22a.

But regardless of any interest the State may have in recording a child's genetic parentage, the State cannot invoke such an interest selectively, only when issuing birth certificates to same-sex couples. As Arkansas's statutes and case law make clear, Arkansas does not require birth certificates to list only genetic parents for children born to married opposite-sex parents. Indeed, Arkansas law *mandates* that a non-genetic parent be listed on the birth certificate when a child is born to a married opposite-sex couple under circumstances identical to those of the Petitioners here. The court's arbitrary imposition of that limitation only for same-sex spouses cannot be justified and conflicts with the express holdings of *Obergefell* and *Windsor*.

The Birth Certificate Law contains no requirement that a husband must be a genetic parent to be named as a parent on the child's birth certificate. To the contrary, his name must be entered on the birth certificate unless "paternity has been [judicially] determined otherwise," Ark. Code § 20-18-401(f)(1)(A), or the mother, her husband, and the putative father all agree in writing that the putative father should be named instead. In all other cases, the statute mandates that the husband must be listed even when no biological tie to the child exists, and even when the absence of any such tie is definitively known. In particular, a husband who consents to have a child through donor insemination is deemed to be the child's legal father, despite the obvious absence of any biological tie. See Ark. Code § 9-10-201(a) (providing that such a child is "deemed the legitimate natural child of * * * the woman's husband"). And as the State confirmed at oral argument, he is listed on the child's birth certificate, as the plain lan-

guage of the Birth Certificate Law requires. App., *infra*, 82a-83a.

As the Birth Certificate Law attests, Arkansas strongly protects the bond between married parents and their children, including in situations where no biological tie exists. Arkansas law has long held that children born to a married couple are presumed to be the offspring of both spouses. See, *e.g.*, *Jacobs* v. *Jacobs*, 225 S.W. 22 (Ark. 1920). That presumption is not merely a device for identifying biological relationships but reflects the State's compelling interest in the stability and autonomy of marital families and the best interests of marital children. See *id.* at 23 (holding that the marital presumption serves the state's desire to protect marital children, "to preserve the peace of families, and to promote the interest of society"). Those interests, unrelated to biology, are so strong that, in situations where a husband's legal parentage of a marital child is disputed, "the challenging party must first show that rebutting that presumption is in the best interest of a child whose parents" may "remain married and plan to continue as the only parents the child has ever known." *R.N.* v. *J.M.*, 61 S.W.3d 149, 155 (Ark. 2001). As this Court noted in *Michael H.* v. *Gerald D.*, 491 U.S. 110, 124 (1989) (plurality opinion), the protection of these compelling state interests is deeply rooted in the common law; "our traditions have protected the marital family" against challenges based on the alleged absence of biological bonds.

Moreover, when a child's genetic parents are not married to one another, Arkansas's statutes *do not permit* listing the genetic father on the original birth certificate *unless* both genetic parents (and the mother's spouse, if any) file affidavits to establish the puta-

tive father's paternity. See Ark. Code § 20-18-401(f)(1) and (2); see also *id.* § 20-18-406(e). In the default situation, where the exception is not satisfied, a child's birth certificate will not reflect the genetic parents but instead will list only the mother (or the mother and her spouse), and the child could not rely on a birth certificate in order to pursue the "identification of personal health issues and genetic conditions." App., *infra*, 22a.

In sum, whatever interest Arkansas may have in "maintaining reliable and comprehensive statistics of all vital events for purposes of public health research and identification of public health trends," App., *infra*, 17a, that interest may not be invoked selectively to justify discrimination only against married same-sex parents. As described above, in numerous circumstances Arkansas law requires male spouses to be listed on their children's original birth certificates regardless of whether they are genetically related to their children—including children conceived through donor insemination, as Petitioners' children were here.

In *Obergefell*, this Court put to rest the notion that discrimination against same-sex couples in marriage can be justified based on arguments relating to biological procreation. In *Obergefell*, the Court reversed the opinion of the Sixth Circuit permitting such discrimination based in part upon "the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes." *DeBoer* v. *Snyder*, 772 F.3d 388, 405 (6th Cir. 2014), rev'd sub nom. *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015). Throughout the proceedings below and in their arguments to this Court, the *Obergefell* respondents defended their policies by citing opposite-sex couples' capacity for procreation. See, *e.g.*, Resp. Br. at 38-39, *Tanco* v. *Haslam*, 135 S. Ct.

2584 (No. 14-562); Resp. Br. at 28-29, *Bourke* v. *Beshear*, 135 S. Ct. 2584 (No. 14-574).

This Court rejected such arguments, recognizing that same-sex couples "establish families" just as opposite-sex couples do, and that "many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted." *Obergefell*, 135 S. Ct. at 2600. The Court held that same-sex couples must be permitted to marry in order to protect those parent-child bonds. As the Court recognized, "[w]ithout the recognition, stability, and predictability marriage offers, the[] children [of same-sex couples] suffer the stigma of knowing their families are somehow lesser." *Ibid.*; see also *Windsor*, 133 S. Ct. at 2694 (holding that DOMA "humiliates" children of same-sex couples and "makes it even more difficult for [them] to understand the integrity and closeness of their own family").

The Arkansas Supreme Court ignored that direction in carving same-sex married couples out of an aspect of marriage available to other couples in the state. That discrimination can no more be justified based on an asserted state interest in identifying or protecting biological parents, selectively applied only to same-sex couples, than could the discrimination at issue in *Obergefell* and *Windsor*. Plainly, treating similarly situated same-sex and opposite-sex couples equally does not impede any legitimate interest Arkansas may have in tracking biological relationships. Petitioners seek to be named as parents on their children's birth certificates only to the same extent that Arkansas already does so for married opposite-sex couples who have children, including when the husband has no biological relationship to the child. Having decided that a non-biological parent's legal status should be reflected on birth certif-

icates in a variety of circumstances involving opposite-sex couples, the State cannot invoke biology as a ground to deny that right only to same-sex couples. In so holding, the opinion below disregards the holdings of *Obergefell* and *Windsor*, and requires this Court's review.

II. The Question Presented Merits This Court's Review

The Arkansas Supreme Court's decision conflicts directly with the unanimous conclusion of other courts that *Obergefell* prohibits the discrimination at issue here. Allowing the decision below to stand would open the door for other courts to pursue a similarly blatant path of denying same-sex couples important marital rights and protections based on equally specious grounds—including especially the procreation and biology-based rationales rejected by *Obergefell* and *Windsor*. This Court should grant review to foreclose that destabilizing path.

All other courts to address this issue since *Obergefell* have recognized that the decision requires that when a child is born to a married same-sex couple, both spouses must be listed as parents on their child's birth certificate, just as both opposite-sex spouses are. Those decisions have recognized that when, as here, states rely on marriage to determine who is listed on a birth certificate, inclusion on the birth certificate is an aspect of marriage that must be extended to same- and opposite-sex couples alike. In *Henderson* v. *Adams*, the district court recognized that "[w]hen the State Defendant created and utilized the Indiana Birth Worksheet, which asks 'are you married to the father of your child,' the State created a benefit for married women

based on their marriage to a man, which allows them to name their husband on their child's birth certificate even when the husband is not the biological father." No. 1:15cv00220, 2016 WL 3548645, at *13 (S.D. Ind. June 30, 2016). The court further recognized that, under *Obergefell*, "this benefit—which is directly tied to marriage—must now be afforded to women married to women." *Ibid.*; see also *Torres* v. *Seemeyer*, 15-cv-288-bbc, 2016 WL 4919978, at *8-9 (W.D. Wis. Sept. 14, 2016) (granting summary judgment to class of same-sex married couples seeking birth certificates reflecting both parents); Order, *De Leon* v. *Abbott*, SA-13-CA-00982-OLG (W.D. Tex. Aug. 11, 2015) (ordering State of Texas to "implement[] policy guidelines recognizing same-sex marriage in death and birth certificates"); *Roe* v. *Patton*, No. 2:15–cv–00253–DB, 2015 WL 4476734, at *1 (D. Utah July 22, 2015) (granting preliminary injunction requiring issuance of birth certificates to same-sex spouses on same terms and conditions as opposite-sex spouses).[4]

This Court's decision in *Obergefell* recognized the profound importance that marriage and the creation of stable family units play in children's lives. "By giving recognition and legal structure to their parents' rela-

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[4] Courts reached similar conclusions under state constitutional law in jurisdictions that permitted same-sex couples to marry before this Court's decision in *Obergefell*. See, *e.g.*, *Gartner* v. *Dep't of Public Health*, 830 N.W.2d 335, 341 (Iowa 2013) (holding that the court's prior decision striking down Iowa's law barring same-sex couples from marriage required issuance of birth certificates listing a birth mother's same-sex spouse as a parent on equal terms with the treatment of children born to opposite-sex spouses).

tionship, marriage allows children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." See *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2600 (2015). A birth certificate is the legal document that connects children to their parents and helps parents "navigate life" by "pav[ing] the way through numerous transactions, large and small." *Henry*, 14 F. Supp. 3d at 1060. Birth certificates have expansive consequences for parents under state and federal law. See pp. 5-7, *supra*. A birth certificate also provides legal documentation of the profound connection between a child and her parents. *Obergefell* warned that "[w]ithout the recognition, stability, and predictability marriage offers, [] children [of same-sex couples would] suffer the stigma of knowing their families are somehow lesser." 135 S. Ct. at 2600-2601. The Arkansas Supreme Court's decision seeks to embed that lesser treatment of same-sex married couples into law.

The issue is of critical importance to families across the country. Arkansas's discriminatory Birth Certificate Law is far from an outlier. Many states have statutes that have not been updated to reflect the impact of *Obergefell* and thus continue to use gendered terms when directing the issuance of birth certificates to children born to married couples. See, *e.g.*, Ala. Code § 22-9A-7(f)(1) (where child born to married woman, "the husband shall be entered on the [birth] certificate as the father" except in certain narrow circumstances); Alaska Stat. § 18.50.160(d) (same); N.C. Gen. Stat. § 130A-101(e) (same); Wis. Stat. § 69.14(e)(1) ("husband" entered on certificate without exception); Wyo. Stat. § 35-1-411(a) (same except in certain narrow circumstances). Officials in those states are likely to rely on

the Arkansas Supreme Court's decision as grounds to refuse to give the gendered terms in those statutes a gender-neutral reading.

This Court should grant review in light of the profound importance of this issue to petitioners and other Arkansas families, and to prevent other jurisdictions from depriving same-sex married couples of equal marriages.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF ARKANSAS

No. CV-15-988

Opinion Delivered December 8, 2016

NATHANIEL SMITH, M.D., MPH, DIRECTOR OF THE ARKANSAS DEPARTMENT OF HEALTH, IN HIS OFFICIAL CAPACITY, AND HIS SUCCESSORS IN OFFICE,
Appellant

v.

MARISA N. PAVAN AND TERRAH D. PAVAN, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF T.R.P., A MINOR CHILD; LEIGH D.W. JACOBS AND JANA S. JACOBS, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF F.D.J., A MINOR CHILD; COURTNEY M. KASSEL AND KELLY L. SCOTT, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF A.G.S., A MINOR CHILD,
Appellees

Appeal from the Pulaski County Circuit Court
[No. 60CV-15-3153]

Honorable Timothy Davis Fox, Judge

Reversed and Dismissed

JOSEPHINE LINKER HART, Associate Justice

Nathaniel Smith, M.D., M.P.H., Director of the Arkansas Department of Health (Smith), appeals from the circuit court's order granting declaratory judgment and

injunctive relief to three couples, appellees Marisa N. Pavan and Terrah D. Pavan, Leigh D.W. Jacobs and Jana S. Jacobs, and Courtney M. Kassel and Kelly L. Scott. At issue is whether the disposition of this case is controlled by the doctrine of res judicata and whether two state statutes governing the issuance of birth certificates violate federal constitutional rights to equal protection and due process under *Obergefell v. Hodges*, __ U.S. __, 135 S. Ct. 2584 (2015), which held that the right of same-sex couples to marry is a fundamental right inherent in the liberty of the person.

In challenging the circuit court's decision on appeal, Smith argues that the circuit court (1) erred in finding that another circuit court had previously granted injunctive relief regarding birth certificates in its orders in *Smith v. Wright*, 60CV-13-2662 (Pulaski Co. Cir. Ct. May 9, 2014 and May 15, 2014), that was later appealed to this court and dismissed by this court as moot, *Smith v. Wright*, 2015 Ark. 298 (per curiam); (2) erred in granting declaratory relief based on its conclusion that *Obergefell* had resolved issues relating to the issuance of birth certificates for the minor children of same-sex couples; (3) erred in finding a due-process violation by the Arkansas Department of Health's (ADH) refusal to issue birth certificates for minor children of married female couples showing the name of the spouse of the mother; (4) erred in finding an equal-protection violation by ADH's refusal to issue birth certificates for minor children of married female couples showing the name of the spouse of the mother; (5) erred by not applying to the facts of this case Arkansas Code Annotated section 9-10-201(a) (Repl. 2015), which addresses children born to married women by means of artificial insemination. We reverse and dismiss.

Appellees are three married female couples. The Pavans were married in New Hampshire in 2011, and the minor child was born to Terrah in Arkansas in May 2015. The child was conceived through artificial insemination involving an anonymous donor. ADH would not place Marisa's name on the minor child's birth certificate. The Jacobses were married in Iowa in 2010, and the minor child was born to Leigh in Arkansas in June 2015, also having been conceived through artificial insemination involving an anonymous donor. ADH would not place Jana's name on the minor child's birth certificate. Courtney Kassell and Kelly Scott resided in Arkansas when the minor child was born to Courtney in Arkansas in January 2015. The conception took place through artificial insemination involving an anonymous donor. The couple married in July 2015. Both before and after their marriage, the couple sought to have Kelly's name placed on the minor child's birth certificate, but ADH denied the request.

Appellees filed suit in the circuit court, seeking a declaration that the refusal to issue birth certificates with the names of both spouses on the birth certificates of their respective minor children violated their constitutional rights to equal protection and due process. Appellees also sought to have certain statutory provisions governing the issuance of birth certificates declared unconstitutional as written. Appellees further sought to enjoin Smith from refusing to list the names of both spouses of a same-sex couple on the birth certificate of the minor child. The three couples also asked for an order requiring Smith to issue corrected birth certificates naming both spouses.

Smith answered the complaint, and both parties filed competing motions for summary judgment. At the

conclusion of the hearing on the motions, the circuit court announced its intention to order Smith to amend the birth certificates of appellees' children. Smith filed a motion for stay. In a subsequent order and memorandum opinion, the motion for stay was denied. In the order and opinion, the circuit court again ordered Smith to issue three amended birth certificates showing the names of both spouses on the birth certificates of their respective minor children.[1] The court, however, dismissed the claims made by the couples in their capacities as representatives of their respective minor children.[2]

In reaching its decision, the circuit court concluded that the circuit court in *Wright* had previously granted injunctive relief regarding birth certificates, and thus, the case was controlled by res judicata. The circuit court also declared as unconstitutional portions of Arkansas Code Annotated section 20-18-401(e), (f) (Repl. 2014), which governs entry of the name of the mother

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[1] After the circuit court denied Smith's petition for a stay, Smith petitioned this court for an emergency stay of the circuit court's order. Because Smith indicated that he did not wish to challenge the portion of the order requiring him to provide amended birth certificates to the appellees, this court denied the petition for a stay as to the portions of the order and memorandum opinion ordering him to provide amended birth certificates to the appellees. This court granted the petition for an emergency stay as to the remainder of the order and memorandum opinion. This court also granted the motion of the American Civil Liberties Union and the Arkansas Civil Liberties Union for permission to file an amicus curiae brief.

[2] The crux of the case before us is the registration of children's births. Despite the central question of the children's rights relating to their birth certificates, this question was not argued by the parties; nor was it addressed or ruled on by the circuit court.

and the father of the child on birth certificates. Further, the circuit court stated that it would interpret Arkansas Code Annotated section 20-18-406(a)(2), which addresses the issuance of a new birth certificate to a "person" who has been "legitimated," in a manner that the circuit court concluded would make the statute constitutional. Smith brought this appeal from the circuit court's decision.

Summary judgment may be granted only when there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. *See, e.g., Washington Cty. v. Bd. of Tr. of the Univ. of Ark.*, 2016 Ark. 34, at 3, 480 S.W.3d 173, 175.

Ordinarily, upon reviewing a circuit court's decision on a summary-judgment motion, we would examine the record to determine if genuine issues of material fact exist. *Id.*, 480 S.W.3d at 175. However, in a case where the parties agree on the facts, we determine whether the appellee was entitled to judgment as a matter of law. *Id.*, 480 S.W.3d at 175. When parties file cross-motions for summary judgment, as in this case, they essentially agree that there are no material facts remaining, and summary judgment is an appropriate means of resolving the case. *Id.*, 480 S.W.3d at 175. As to issues of law presented, our review is de novo. *Id.*, 480 S.W.3d at 175.

We first address Smith's argument that the circuit court erred in concluding that the disposition of this case is controlled by res judicata. In its opinion, the circuit court noted that Smith was a party in *Wright*. The circuit court further noted that the *Wright* plaintiffs

filed a summary-judgment motion, requesting that the court issue a permanent mandatory injunction

> [r]equiring Defendant Nathaniel Smith, M.D., as interim director of the Arkansas Department of Health, and his successors, to henceforth issue birth certificates for children born of marriages between members of the same sex that were entered into in other states to reflect that the married parents are the parents of the children born of the marriage; and, also, requiring said Defendant to issue amended birth certificates to any married couples of the same sex that previously gave birth to children in Arkansas to reflect that the married parents are the parents of the children born of the marriage.

The circuit court further noted that in *Wright*, the final judgment of May 15, 2014, stated that

> it is and was the intent of the Order to grant Plaintiff's Motion for Summary Judgment without exception and as to all injunctive relief requested therein. In fact, this was the expressly stated title of the May 9, 2014 Order. Plaintiff's motion requested injunctive relief and properly identified the relevant laws at issue in this challenge.

The circuit court concluded that the claims brought by the Pavans and the Jacobses were fully and completely litigated in *Wright* and that the *Wright* injunction is res judicata and binding on Smith.

On appeal, Smith argues that the *Wright* court did not expressly grant injunctive relief regarding birth

certificates. The parties note that the May 15, 2014 order provided

> that Plaintiffs request for a permanent injunction is GRANTED and the Court does hereby permanently enjoin all Defendants . . . from enforcing Amendment 83 to the Arkansas Constitution, Act 146 of 1997, § 1(b)-(c) (codified at Ark. Code Ann. 9-11- 208(a) (1)-(2)) and Act 144 of 1997 (codified at Ark. Code Ann. §§ 9-11-107 (b), -109); and all other state and local laws and regulations identified in Plaintiff's complaint or otherwise in existence to the extent they do not recognize same-sex marriages validly contracted outside Arkansas, prohibit otherwise qualified same-sex couples from marrying in Arkansas or deny same-sex married couples the rights, recognition and benefits associated with marriage in the State of Arkansas.

What is at issue here is whether the doctrine of collateral estoppel applies. Collateral estoppel, also known as issue preclusion, bars relitigation of issues of law or fact previously litigated by a party. *See, e.g., Johnson v. Union Pac. R.R.*, 352 Ark. 534, 544, 104 S.W.3d 745, 750 (2003). The elements of collateral estoppel are that (1) the issue sought to be precluded must be the same as that involved in the prior litigation, (2) the issue must have been actually litigated, (3) it must have been determined by a valid and final judgment, and (4) the determination must have been essential to the judgment. *Id.*, 104 S.W.3d at 750.

Rule 65(d)(1) of the Arkansas Rules of Civil Procedure requires that "[e]very order granting an injunc-

tion and every restraining order must (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." Thus, an injunction order cannot refer to the complaint or any other document. *See Baptist Health v. Murphy*, 362 Ark. 506, 209 S.W.3d 360 (2005) (applying rule).

A fair reading of the *Wright* orders indicates that the orders did not address the issues presented here relating to birth certificates. In fact, birth certificates are not mentioned at all in the orders. Instead, in examining the *Wright* orders, the *Wright* court ruled on the constitutionality of amendment 83 and statutes governing marriage. We note that the circuit court, in concluding that *Wright* should be given the effect of res judicata, ruled that if the *Wright* judgment did not comply with Rule 65(d) concerning the specificity of its injunctive language, then that issue could have been raised by Smith in an appeal in *Wright*. Further, the circuit court stated that when this court dismissed the *Wright* appeal as moot, Smith had the opportunity to point out to the court that all of the issues relating to the injunction were not resolved by *Obergefell*. We hold, however, that the language in the *Wright* orders would not have placed Smith on notice that he needed to appeal those orders to this court and raise on appeal arguments related to the overbreadth of the injunctive relief granted and to the issuance of birth certificates.

In the next issue on appeal, Smith argues that the circuit court erred in granting declaratory relief based on *Obergefell*. The circuit court's opinion suggests that it based its analysis of the constitutionality of the birth-certificate statutes at issue here entirely on the holding

of *Obergefell*. There are two statutes that the circuit court considered. The first, Arkansas Code Annotated section 20-18-401 provides in part as follows:

> (e) For the purposes of birth registration, the mother is deemed to be the woman who gives birth to the child, unless otherwise provided by state law or determined by a court of competent jurisdiction prior to the filing of the birth certificate. The information about the father shall be entered as provided in subsection (f) of this section.
>
> (f)(1) If the mother was married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child, unless:
>
> (A) Paternity has been determined otherwise by a court of competent jurisdiction; or
>
> (B) The mother executes an affidavit attesting that the husband is not the father and that the putative father is the father, and the putative father executes an affidavit attesting that he is the father and the husband executes an affidavit attesting that he is not the father. Affidavits may be joint or individual or a combination thereof, and each signature shall be individually notarized. In such event, the putative father shall be shown as the father on the certificate and the parents may give the child any surname they choose.
>
> (2) If the mother was not married at the time of either conception or birth or between conception and birth, the name of the father shall not be en-

> tered on the certificate of birth without an affidavit of paternity signed by the mother and the person to be named as the father. The parents may give the child any surname they choose.
>
> (3) In any case in which paternity of a child is determined by a court of competent jurisdiction, the name of the father and surname of the child shall be entered on the certificate of birth in accordance with the finding and order of the court.
>
> (4) If the father is not named on the certificate of birth, no other information about the father shall be entered on the certificate.

In considering Arkansas Code Annotated section 20-18-401(e), (f), the circuit court found that the statute "intertwined the concepts of 'parent' with certain rights and presumptions occurring within a marital relationship, using now impermissible limiting spousal terms of 'husband' and 'wife.'" The circuit court concluded that "[s]uch language categorically prohibits every same-sex married couple, regardless of gender, from enjoying the same spousal benefits which are available to every opposite-sex married couple." The circuit court found that, based on *Obergefell*, the majority of subsections (e) and (f) had to be struck down as unconstitutional.

The other statute at issue, Arkansas Code Annotated section 20-18-406(a) (2), provides in part as follows:

> (a) The State Registrar of Vital Records shall establish a new certificate of birth for a person born in this state when he or she receives the following:
>
> ....

> (2) A request that a new certificate be established and any evidence, as required by regulation, proving that the person has been legitimated, or that a court of competent jurisdiction has determined the paternity of the person or that both parents have acknowledged the paternity of the person and request that the surname be changed from that shown on the original certificate.

In considering this statute, the circuit court found that, in light of *Obergefell*,

> the phrase "person to be legitimated" is declared to include the minor children of any couple—same-sex or opposite-sex—who married subsequent to the birth of the minor child, and who present proof to the Arkansas Department of Health of the date of birth of the minor child and of the date of their marriage. In the event any biological parent is listed on a birth certificate sought to be amended, a court order shall be required before an amended certificate is issued which removes such person(s) name. In the event one or both of the spouses was married to another individual at any time from the birth of the minor child forward, no amended birth certificate shall be issued absent a court order naming the current spouses as the parents of the minor child.

We disagree with the circuit court's analysis of both statutes. *Obergefell* did not address Arkansas's statutory framework regarding birth certificates, either expressly or impliedly. Rather, the United States Supreme Court stated in *Obergefell* that "the right to

marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty." *Obergefell*, __U.S. at ___, 135 S. Ct. at 2604. The Court mentioned birth certificates only once, stating,

> Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules.

Obergefell, __ U.S. at __, 135 S. Ct. at 2601. This single mention of birth certificates was related only to its observation that states conferred benefits on married couples, which in part demonstrated that " the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples." *Id.* at __, 135 S.Ct. at 2599.

The amicus curiae brief notes that in *Obergefell*, the Court stated that it declined to "stay its hand to allow slower case-by-case determination of the required

availability of specific public benefits to same sex- couples" because "it would deny gays and lesbians many rights and responsibilities intertwined with marriage." *Id.* at __, 135 S. Ct. at 2606. We conclude below, however, that *Obergefell* does not impact these statutes governing the issuance of birth certificates and that these statutes pass constitutional muster.[3]

In interpreting the statutes, every act carries a strong presumption of constitutionality. Any doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality, and before an act will be held unconstitutional, the incompatibility between it and the constitution must be clear. *Mendoza v. WIS Int'l, Inc.*, 2016 Ark. 157, at 3, 490 S.W.3d 298, 300. When possible, we will construe a statute so that it is constitutional. *Id.*, 490 S.W.3d at 300. In determining the constitutionality of a statute, we look to the rules of statutory construction. *Id.*, 490 S.W.3d at 300. When construing a statute, the basic rule is to give effect to the intent of the legislature, and where the language of a statute is plain and unambiguous, we determine the legislative intent from the ordinary meaning of the language used. *Id.*, 490 S.W.3d at 300. In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.*, 490 S.W.3d at 300. This court reviews both the circuit court's interpretation of the constitution as well as issues of statutory in-

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[3] Both Chief Justice Brill and Justice Danielson misread and essentially add to the language they cite from Obergefell to suggest that the United States Supreme Court has ruled on the issue before us. While Justice Wood relies on Obergefell, she essentially acknowledges that Obergefell did not specifically address the issue before us.

terpretation de novo, because it is for this court to determine the meaning of a statute. *Brown v. State*, 2015 Ark. 16, at 6, 454 S.W.3d 226, 231.

Arkansas Code Annotated section 20-18-401(e) provides that the mother is deemed to be the woman who gives birth to the child. Subsection (f) governs who would be considered the father, providing that if the mother was married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child. Because we determine legislative intent from the ordinary meaning of the language used, we note that "husband" is defined as "a married man." *Webster's Third New International Dictionary* 1104 (2002). "Father" is defined as "a man who has begotten a child." *Webster's Third New International Dictionary* 828 (2002). Thus, in subsection (f), "father" identifies the child's biological father, and "husband" identifies the mother's male spouse. The mother's spouse, or "husband," is entered on the certificate as the "father" of the child if the mother was married at the time of either conception or birth or between conception and birth. Subsection (f)(1), however, further provides that the name of the husband would not be entered on the certificate as the father upon a determination of paternity by a court order or by the proper affidavits regarding the child's paternity. Thus, the statute centers on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife. We see no basis for the circuit court's conclusion that the statute impermissibly "intertwined" the concepts of "parent" with the rights and presumptions of marriage by using the words "husband"

and "wife." We hold that Arkansas Code Annotated section 20-18-401(e), (f) does not run afoul of *Obergefell*.

Under Arkansas Code Annotated section 20-18-406(a)(2), a new birth certificate is provided when it is proved that the "person has been legitimated." While the phrase "person has been legitimated" is not defined, we have observed that "an illegitimate child is a child who is born at the time that his parents, though alive, are not married to each other," and that "a child is considered legitimate if the parents were married at the time of its conception and before its birth, even though they were not married to each other at the time the child was born." *Willmon v. Hunter*, 297 Ark. 358, 360, 761 S.W.2d 924, 925 (1988). Thus, Arkansas Code Annotated section 20-18-406(a)(2) provides that a new birth certificate may be issued on a showing that the child's parents, who conceived the child, have married. This interpretation comports with ADH's own regulations, which provide that "[i]f the natural parents marry after the birth of a child, a new certificate of birth shall be prepared by the State Registrar for a child born in this State, upon receipt of an affidavit of paternity signed by the natural parent of said child, together with a certified copy of the parents' marriage record." Code Ark. R. 007.12.1-5.2. Thus, this statute considers the relationship of the biological mother and the biological father to the child. Accordingly, we see no basis for the circuit court's conclusion that *Obergefell* requires this court to construe the biologically based phrase "person to be legitimated"—in a statute governing birth certificates—to include the minor children of a same-sex couple who married after the birth of the minor child. We hold that *Obergefell* did not answer the questions presented in this case regarding the constitutionality of

Arkansas statutes relating to the issuance of birth certificates.

We turn to the circuit court's finding that Arkansas Code Annotated section 20-18-401(e), (f) and Arkansas Code Annotated section 20-18-406(a)(2) unconstitutionally deprive appellees of due process and equal protection. There are two primary ways to challenge the constitutionality of a statute: an as-applied challenge, in which the court assesses the merits of the challenge by considering the facts of the particular case in front of the court, not hypothetical facts in other situations, and a facial challenge, which seeks to invalidate the statute itself. *Layman v. State*, 2015 Ark. 485, at 3, 478 S.W.3d 203, 205. A facial invalidation of a statute is appropriate if it can be shown that no set of circumstances exists under which the statute would be valid. *Martin v. Kohls*, 2014 Ark. 427, at 11, 444 S.W.3d 844, 850. We conclude that because the couples received the relief they requested and because that relief is not challenged on appeal—the issuance of birth certificates naming both spouses on the birth certificate—we do not have before us an as-applied challenge. Though the circuit court did not describe the challenge presented by the appellees, we conclude that their challenge was a facial challenge.

In our analysis of the statutes presented above, it is the nexus of the biological mother and the biological father of the child that is to be truthfully recorded on the child's birth certificate. That truthful information is required in the application for an initial or amended birth certificate is evidenced by Arkansas Code Annotated section 20-18-105(a)(1), which allows a person to be punished by a $10,000 fine and five years' imprisonment for knowingly making a false statement in a vital

record. Our conclusion is supported by the only evidence presented in the record, the affidavit of Melinda Allen, ADH's Vital Records State Registrar. Allen averred that, in that capacity, she supervised the issuance and maintenance of birth certificates. She further averred as follows:

> The overarching purpose of the vital records system is to ensure that vital records, including birth certificates as well as death certificates and marriage certificates, are accurate regarding the vital events that they reflect. The accuracy of the records allows ADH to compile, maintain, and analyze vital statistics. ADH had a legitimate interest in maintaining reliable and comprehensive statistics of all vital events for purposes of public health research and identification of public health trends.
>
> Identification of biological parents through birth records is critical to ADH's identification of public health trends, and it can be critical to an individual's identification of personal health issues and genetic conditions. Even in the case of surrogacy where the biological mother is never intended to be the legal parent of a child, the statutes provide that an initial birth certificate is issued reflecting the biological mother as a parent, and then an amended birth certificate is issued reflecting the intended parent(s) as legal parent(s). The original birth certificates is sealed, but maintained by ADH. In cases, of adoption, ADH also maintains sealed copies of original birth certificates reflecting biological parent-

> age. This is important because a child may need to access information about biological parentage for health-related reasons. The State has a legitimate interest in maintaining such information (even if under seal and releasable only pursuant to a court order) in order to protect the future health of the child.

We now consider appellees' due process challenge to Arkansas Code Annotated section 20-18-401(e), (f) and Arkansas Code Annotated section 20-18-406(a)(2). On the question of due process, the United States Supreme Court has stated,

> Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.
>
> The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.

Obergefell, __ U.S. at __, 135 S. Ct. at 2597-98 (internal citations omitted).

As stated in the court's order, the examples provided by appellees of how the failure to include both same-sex spouses on birth certificates or amended birth certificates may adversely affect their legal status regarding the minor children included

> identification procedures for Social Security numbers and passports, denial of the right to authorize medical care for the minor, denial of the right to authorize school related activities, denial of the right to apply for needed governmental or employment related benefits, denial of survivor benefits in the case of death of one of the spouses, denial to the child of inheritance rights, disruption of the parent-child relationship in the event of divorce of the same-sex couple, and the award of child support in the event of divorce of a same-sex couple.

In its ruling, however, the circuit court stated that its order "does not legally resolve any of those potential issues." Furthermore, appellees did not present evidence, or even statutory authority, to support their assertion that any of these issues are answered by who is listed as the mother and the father on a birth certificate.

As noted above, the *Obergefell* Court held that the right of same-sex couples to marry is a fundamental right inherent in the liberty of the person under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Obergefell*, __ U.S. at ___, 135 S. Ct. at 2604. The Court has further stated that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care,

custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

In finding a due-process violation, however, the circuit court has conflated distinct categories of marriage, parental rights, and vital records. The question presented in this case does not concern either the right to same-sex marriage or the recognition of that marriage, or the right of a female same-sex spouse to be a parent to the child who was born to her spouse. What is before this court is the narrow issue of whether the birth-certificate statutes as written deny the appellees due process. The purpose of the statutes is to truthfully record the nexus of the biological mother and the biological father to the child. On the record presented, we cannot say that naming the nonbiological spouse on the birth certificate of the child is an interest of the person so fundamental that the State must accord the interest its respect under either statute.

As for appellees' equal-protection challenge to Arkansas Code Annotated section 20-18-401(e), (f) and Arkansas Code Annotated section 20-18-406(a)(2), we have observed here that under these statutes, the birth certificate evidences biological relationships. Appellees contend that the statutes result in disparate treatment by permitting male spouses of female mothers to be listed as fathers, even though the male spouse may not be the child's biological father. We observe, however, that under Arkansas Code Annotated section 20-18-401(f), the husband's designation as father may be refuted, which evidences that the biological connection is what the birth certificate intends to record. Moreover, our statutes penalize anyone who knowingly makes a false statement in a vital record. Ark. Code Ann. § 20-18-105(a)(1). In the situation involving the female

spouse of a biological mother, the female spouse does not have the same biological nexus to the child that the biological mother or the biological father has. It does not violate equal protection to acknowledge basic biological truths. As has been noted,

> [t]o fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.

Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 73 (2001).

Nevertheless, in considering an equal-protection claim, and in considering a heightened standard to withstand equal-protection scrutiny, it must be established at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. *Id.*, 533 U.S. at 60.

We conclude that the evidence presented by Smith—the affidavit of the vital records state regis-

trar—established that the challenged classification serves an important governmental objective—tracing public-health trends and providing critical assistance to an individual's identification of personal health issues and genetic conditions—and that the means employed—requiring the mother and father on the birth certificate to be biologically related to the child—are substantially related to the achievement of those objectives.

Finally, in his brief and during oral argument to this court, Smith cited Arkansas Code Annotated section 9-10-201(a), which provides that "[a]ny child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman's husband if the husband consents in writing to the artificial insemination." In oral argument, Smith conceded that this statute is constitutionally infirm and suggests that if this court were to review this statute on appeal, the court could resolve many of the concerns raised by the appellees by amending the wording of the statute. However, this court is not a legislative body, and it cannot change the wording of the statute. The legislative branch of the state government has the power and responsibility to proclaim the law through statutory enactments, and the judicial branch has the power and responsibility to interpret the legislative enactments. *Fed. Express Corp. v. Skelton*, 265 Ark. 187, 197-98, 578 S.W.2d 1, 7 (1979). Furthermore, the circuit court did not rule on the constitutionality of this statute. Thus, Smith has failed to preserve this issue for appeal. *See, e.g., TEMCO Constr.,*

LLC v. Gann, 2013 Ark. 202, at 12, 427 S. W.3d 651, 658. We decline to address Smith's argument.[4]

Because we conclude that the circuit court erred in finding that the case was controlled by *Wright*, and because we conclude that the circuit court erred in finding that Arkansas Code Annotated section 20-18-401(e), (f) and Arkansas Code Annotated section 20-18-406(a)(2) facially violated the appellees' rights to due process and equal protection, we reverse and dismiss.[5]

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[4] "Chief Justice Brill's extended discussion of the statute is purely advisory in nature. As this court has said on numerous occasions, we neither answer academic questions nor issue advisory opinions. *See, e.g., Hampton v. State*, 2014 Ark. 303, at 7, 437 S.W.3d 689, 693. The State suggested that we rewrite this same statute to address an issue that was never ruled on by the circuit court. Consistently with our longstanding practices and jurisprudence, we decline to do so. We further note that neither the Solicitor General in his oral argument nor Chief Justice Brill in his opinion has addressed the right of a child to knowledge of his or her biological parentage and the right of the child to a birth certificate issued by ADH that truthfully sets out his or her lineage.

[5] Justice Wood contends that this court should reverse and vacate the circuit court's order to conduct a full evidentiary hearing in light of concessions made by the State. The parties, however, have not requested such relief. The parties consider the case fully litigated and ready for a determination concerning whether the circuit court committed trial error. It would be inappropriate for this court to reverse and remand a case for retrial—not because the circuit court committed trial error—but because this court wants the parties to present more evidence and raise more issues. This court has repeatedly stated that matters outside of the record will not be considered on appeal. *See, e.g., McDermott v. Sharp*, 371 Ark. 462, 465, 267 S.W.3d 582, 585 (2007). Justice Wood further suggests that this court might stay its hand and remand to allow action by the General Assembly. However, there is nothing in the record to suggest that the General Assembly will pass laws that will address issuance of birth certificates. Morever, staying a case

On a collateral matter, in *Smith v. Pavan*, 2015 Ark. 474 (per curiam), this court granted in part and denied in part Smith's petition for an emergency stay pending appeal. This court also observed that the circuit court's order contained "inappropriate remarks," and we stated our intent to address the remarks following our receipt of the entire record on appeal. The gist of Judge Fox's remarks was that if this court granted the stay, then it would deprive persons of their constitutional rights, and that this court previously had deprived people of their constitutional rights in a separate matter. We remind Judge Fox that, in accordance with the Arkansas Code of Judicial Conduct, all courts take great care to "uphold and apply the law" and "perform all duties of judicial office fairly and impartially." Ark. Code Jud. Conduct R. 2.2. All courts intend to faithfully apply both federal and state constitutional law in a manner that does not result in the deprivation of constitutional rights. We remind Judge Fox that this same code requires a judge to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Ark. Code Jud. Conduct R. 1.2. A remark made to gain the attention of the press and to create public clamor undermines "public confidence in the independence, integ-

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to await action by the General Assembly is unlike circumstances where we stay an appeal pending the disposition of another case that is on appeal in federal court that addresses the same issues. *See Unborn Child Amendment Comm. v. Ward*, 318 Ark. 165, 883 S.W.2d 817 (1994) (staying appeal of a circuit-court order after recognizing that, until such time as the federal court's decision is reversed by the appropriate appellate court, the permanent injunction issued by the federal district court will be binding on the State of Arkansas and its instrumentalities).

rity, and impartiality," not only of this court, but also of the entire judiciary. Judge Timothy Davis Fox is hereby admonished for his inappropriate comments made while performing the duties of his judicial office.[6]

Reversed and dismissed.

BRILL, C.J., and WOOD, J., concur in part and dissent in part.

DANIELSON, J., dissents.

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[6] Citing several cases, Justice Danielson asserts that this court should not caution Judge Fox for his inappropriate comments made while performing the duties of his judicial office. These cases, however, are wholly inapposite to the present situation; they do not involve the cautioning of a trial judge for comments made while performing judicial duties, but rather concern criminal or contempt proceedings against laymen. When one rules as a judge, he is governed by ethical considerations and restrictions not required or even expected of laymen. Experience has established that the public will benefit if the judge obeys them. The question presented is whether a circuit judge may indulge in unfounded and intemperate criticism or abuse of the courts while on the bench.

APPENDIX B

SUPREME COURT OF ARKANSAS

No. CV-15-988

Opinion Delivered December 8, 2016

NATHANIEL SMITH, M.D., MPH, DIRECTOR OF THE ARKANSAS DEPARTMENT OF HEALTH, IN HIS OFFICIAL CAPACITY, AND HIS SUCCESSORS IN OFFICE,
Appellant

v.

MARISA N. PAVAN AND TERRAH D. PAVAN, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF T.R.P., A MINOR CHILD; LEIGH D.W. JACOBS AND JANA S. JACOBS, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF F.D.J., A MINOR CHILD; COURTNEY M. KASSEL AND KELLY L. SCOTT, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF A.G.S., A MINOR CHILD,
Appellees

Concurring In Part; Dissenting In Part

HOWARD W. BRILL, Chief Justice

Come gather 'round people
Wherever you roam
And admit that the waters
Around you have grown
And accept it that soon
You'll be drenched to the bone
If your time to you is worth savin'

Then you better start swimmin' or you'll sink like a stone
For the times they are a-changin'
. . . .

Come senators, congressmen
Please heed the call
Don't stand in the doorway
Don't block up the hall
For he that gets hurt
Will be he who has stalled
There's a battle outside and it is ragin'

Bob Dylan[1]

The Supreme Court of the United States has held that state bans on same-sex marriage violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015). *See also* Ark. Const. art. II, § 3 ("The equality of all persons before the law is recognized."). The six plaintiffs in this case have sought judicial relief to obtain birth certificates for their children. It is true that "individuals need not await legislative action before asserting a fundamental right." *Obergefell*, 576 U.S. at ___, 135 S. Ct. at 2605. But our tripartite system of government rests on the premise that the three

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[1] Bob Dylan, *The Times They Are A-Changin' on The Times They Are A-Changin*, (Columbia Records 1964). The Nobel Prize in Literature was awarded to Bob Dylan for having created new poetic expressions within the great American song tradition."

Press Release-The Nobel Prize in Literature 2016 (Oct. 13, 2016), <https://nobelpnze.org/nobelprizes/literature/laureates/2016/press/html

branches not only have separate powers, but also have unique powers and responsibilities and capabilities. I write this opinion, concurring in part and dissenting in part, to highlight the roles of all three branches. I would affirm in part the ruling of the circuit court, and I would reverse in part the ruling of the circuit court.

I. *The Effect of Obergefell*

The holding in *Obergefell* is narrow: The Supreme Court declared same-sex marriage legal in all fifty states. The question here is the broader impact of that ruling as it affects birth certificates. In its list of aspects of marital status, the Court mentioned "birth certificates." The present case asks whether a married same-sex couple is entitled to a birth certificate for a child born to one of the married individuals. The logical extension of *Obergefell*, mandated by the Due Process Clause and the Equal Protection Clause, is that a same-sex married couple is entitled to a birth certificate on the same basis as an opposite-sex married couple. As the Court stated in *Obergefell*, same-sex couples may not be denied "the constellation of benefits that the States have linked to marriage." 576 U.S. at ___, 135 S. Ct. at 2601. The right to a birth certificate is a corollary to the right to a marriage license. I analyze the circuit court's ruling, and the issues presented, in light of three scenarios.

A. Scenario One

Two married couples wish to be parents. Unable to conceive naturally, they use an anonymous donor's sperm for artificial insemination. In each couple, the woman gives birth to a child.

The first couple is a man and a woman. Arkansas Code Annotated section 9-10- 201(a) (Repl. 2015)

"deems" the husband to be the father of the child, provided that he has consented in writing to the artificial insemination. The donor has no legal responsibility or rights to the child. The birth certificate will name the woman and her husband as the parents of the child.

The second couple is a woman and a woman. But the language of the statute says "husband." At oral argument, the State of Arkansas conceded, properly so, that, pursuant to the Court's holding in *Obergefell*, the second couple is entitled to a birth certificate listing both women as parents. The State suggested that this court simply substitute the word "spouse" for "husband" in section 9-10-201(a). This statutory provision was not fully litigated below and was not ruled on by the circuit court. Without engaging in that statutory legerdemain, the circuit court granted the relief in decreeing the issuance of birth certificates to the two married same-sex couples. In light of *Obergefell*, this court should affirm that result. Accordingly, I dissent from that part of the majority opinion denying relief.[2] I would remand this part of the circuit court's order for appropriate action.

B. Scenario Two

Two unmarried couples wish to be parents. Unable to conceive naturally, they use the sperm of an anonymous donor for artificial insemination. In each instance, the woman gives birth to a child. The first couple is a man and woman. The second couple is a woman and a woman.

After the child is born to the woman, the couple marries and seeks a birth certificate with both names.

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[2] Although I find some of Judge Fox's comments inappropriate, I dissent from the majority's decision to admonish him.

Neither couple may use section 9-10-201(a), which is limited to couples married at the time of the artificial insemination. How is the other individual to be added to the birth certificate as a parent? How do these couples obtain a birth certificate? After *Obergefell*, may the burden on the same-sex couple be greater than the burden on the opposite-sex couple?

Arkansas Code Annotated section 20-18-406(a)(2) (Repl. 2014) states that a new birth certificate will be issued when there is "any evidence, as required by regulation, proving that the person has been legitimated, or that a court of competent jurisdiction has determined the paternity of the person or that both parents have acknowledged the paternity of the person." Although the application of this provision may be obvious in the case of an opposite-sex couple, it is not obvious in the case of a same-sex couple. What is the "evidence, as required by regulation"? What is the meaning of "the person has been legitimated"? What is the "paternity of the person"?

I concur with the majority's decision that the circuit court exceeded its authority in giving a court-ordered definition of the phrase "person has been legitimated" in Arkansas Code Annotated section 20-18-406. In addition, the circuit court's striking subsections (e) and (f) of Arkansas Code Annotated section 20-18-401 may have unforeseen consequences or an impact on parents going far beyond those in this litigation. The circuit court had no basis to award this particular relief to the unmarried couple who had a child and subsequently married. Legislative and executive actions are necessary to provide what *Obergefell* requires.

The need for legislative and executive action is demonstrated by consideration of an affidavit submitted by the State in its motion for summary judgment. Melinda Allen, the Vital Records State Registrar for the Arkansas Department of Health, stated, in relevant part,

> If an Arkansas hospital where a woman gives birth to a child submits documentation to ADH reflecting both the woman and her spouse or another person as parents of the child, ADH issues an original birth certificate reflecting both the woman and her spouse or other indicated person as parents of the child. . . . ADH processes all original birth certificates of children born in Arkansas hospitals based upon information submitted by the hospitals without regard to the sexual orientation, gender, or marital status of the woman giving birth to the child, and without regard to the sexual orientation, gender, or marital status of any other parent of the child.

The affidavit of Melinda Allen also states,

> ADH amends birth certificates to add a parent if presented with a court order determining parentage or otherwise granting parental rights to an intended parent, or approving adoption by an intended parent, or otherwise instructing ADH to amend a birth certificate to add an intended parent. ADH processes such amendments without regard to the sexual orientation, general, marital status, or any other characteristic of any parent or intended parent of a child.

The circuit court appears to have relied on Allen's affidavit that the unmarried, same-sex couple was nevertheless entitled to a birth certificate at the time of the child's birth. However, that affidavit, and the practice that it proclaims, may be inconsistent with the existing Arkansas statutes. For instance, the affidavit speaks of the "intended parent," a phrase not found in that statutory provision. I can only repeat the point made above that legislative and executive actions are needed to effect appropriate and required changes.

C. Scenario Three

Two married couples, one opposite-sex and one same-sex, wish to be parents. In the case of each couple, none of the spouses could give birth. If a child becomes available to the couples, the statutory mechanism for parenthood is adoption. See Ark. Code Ann. §§ 9-9-201 et seq. Under the rationale of *Obergefell*, both married couples are to be treated equally. The law is now gender-neutral: each couple may now seek adoption under the statutory standards and obtain a birth certificate.

II. *Conclusion*

These scenarios are a mere preview of the variations that may be presented by the changes in society and the changes in reproductive methods. Regardless of personal values and regardless of a belief that the United States Supreme Court may have wrongfully decided a legal issue, all are bound by the law of the land.[3]

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[3] Following the *Obergefell* decision, Governor Asa Hutchinson issued the following statement: "'While my personal convictions will not change, as Governor I recognize the responsibility of the state to follow the direction of the U.S. Supreme Court. As a result of

See U.S. Const, art. VI, cl. 2. The oath taken by state judges, legislators, and executive officers is to uphold the Constitution of the United States and the Constitution of the State of Arkansas. This court has no power to order the legislature to make statutory changes or the executive branch to alter regulations.[4]

The three branches of our government protect the constitutional rights of its citizens. In *Federal Express Corporation v. Skelton*, 265 Ark. 187, 197, 578 S.W.2d 1, 7 (1979), this court aptly stated,

> Our government is composed of three separate independent branches: legislative, executive and judicial. Each branch has certain specified powers delegated to it. The legislative branch of the State government has the power and responsibility to proclaim the law through statutory enactments. The judicial branch has the power and responsibility to interpret the legislative enactments. The executive branch has the

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this ruling, I will direct all state agencies to comply with the decision. . . ." Press Release of June 26, 2015.

[4] *See Marie v. Mosier*, ___ F. Supp. 3d____, 2016 WL 3951744 (D. Kan. July 22, 2016) (issuing an injunction against state defendants to comply with the broad holding of *Obergefell* and stating that the court "cannot assign plaintiffs' constitutional rights to . . . . uncertainty . . . . [of] defendants 'assurances of future compliance); *Henderson v. Adams*, ___ F. Supp. 3d ___, 2016 WL 3548645 (S.D. Ind. June 30, 201,6) (holding that statutory scheme violated same-sex parents' rights to equal protection); *Brenner v. Scott*, 2016 WL 3561754 (N.D. Fla. Mar. 30, 2016) ("That the Legislature chose not to pass legislation to bring Florida['s birth certificate statute] into compliance [with the ruling in *Obergefell*] does not help [state officials].").

> power and responsibility to enforce the laws as enacted and interpreted by the other two branches.

The times indeed are a-changin'. All three branches of the government must change accordingly. It is time to heed the call.

APPENDIX C

SUPREME COURT OF ARKANSAS

No. CV-15-988

Opinion Delivered December 8, 2016

NATHANIEL SMITH, M.D., MPH, DIRECTOR OF THE ARKANSAS DEPARTMENT OF HEALTH, IN HIS OFFICIAL CAPACITY, AND HIS SUCCESSORS IN OFFICE,
Appellant

v.

MARISA N. PAVAN AND TERRAH D. PAVAN, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF T.R.P., A MINOR CHILD; LEIGH D.W. JACOBS AND JANA S. JACOBS, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF F.D.J., A MINOR CHILD; COURTNEY M. KASSEL AND KELLY L. SCOTT, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF A.G.S., A MINOR CHILD,
Appellees

Concurring In Part And Dissenting In Part

Rhonda K. Wood, Associate Justice

The fluid nature of everyone's reaction to the same-sex marriage decision and the State's understandably evolving response to it requires this court to reverse, vacate, and remand the portion of the circuit court's order regarding the facial and as-applied constitutional challenges to Ark. Code Ann. §§ 20-19-401 and 406. Under the prudential-mootness doctrine, which I en-

courage this court to adopt, a court may withhold relief based on considerations of prudence and comity for co-ordinate branches of government [that] counsel the court to stay its hand, and to withhold relief it has the power to grant." *S. Utah Wilderness All. v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997) (citing *Chamber of Commerce v. United States Dep't of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980)).

In simple terms, this case is fluctuating and underdeveloped. In addition, and contrary to the majority's view, I believe states must comprehensively review their laws so that married same-sex couples and opposite-sex couples receive the same benefits of marriage in light of the United States Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). I encourage the legislature to address the relevant birth-certificate statutes in the upcoming session to avoid a plethora of litigation and confusion for the courts. After all, these decisions are matters of policy that are best made by the legislative branch, which has the exclusive authority to determine public policy. *State Farm Mut. Auto. Ins. Co. v. Henderson*, 356 Ark. 335, 342, 150 S.W.3d 276, 280 (2004).

The federal court's prudential-mootness doctrine should be adopted and applied to this case. This doctrine has "particular applicability in cases . . . where the relief sought is an injunction against the government." *S. Utah Wilderness All.*, 110 F.3d at 727. The key consideration is whether "circumstances changed since the beginning of litigation that forestall any occasions for meaningful relief." *Id.* Two key circumstances have developed since this litigation started. First, plaintiffs received relief in that the State has issued the appropriate birth certificates to them. Second, the

State concedes that the relevant statutes involving determination of parentage must comply with *Obergefell*, including the statute governing the status of people born via artificial insemination. These developments render the majority's decision provisional.

The provisional nature of this case is enhanced by its procedural posture. The parties filed cross-motions for summary judgment. When summary judgment is sought, the circuit court must decide if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Ark. R. Civ. P. 56(c) (2016). But this does not mean that the mere existence of cross-motions for summary judgment implies there are no genuine issues of material fact. "The fact that both parties simultaneously are arguing that there is no genuine dispute of fact, however, does not establish that a trial is unnecessary thereby empowering the court to enter judgment as it sees fit." Charles A. Wright, Arthur Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2720, 327-28 (3d ed. 1998) (explaining in terms of the federal rules). In other words, when two parties file cross-motions, there may still be undisputed or unresolved facts. The parties in those cases are only "contending for the purpose of his own motion that there is no material issue of fact in the case." *Wood v. Lathrop*, 249 Ark. 376, 379, 459 S.W 2d 808 809 (1970). Thus, even with the parties' stipulation, the court must still determine whether the material facts needed to prove the allegation are indeed present and undisputed.

The difficulty on appeal is much has changed: both parties concede that material facts have changed; the

State's application of Arkansas' statutes has changed; and the State's interpretation of *Obergefell* has changed. First, according to the affidavit of the State Registrar of Vital Records, the Department of Health will issue birth certificates listing both same- sex parents if the hospital submits documentation reflecting that fact. However, the parties disputed at oral argument how the department's decision is actually being applied. There are no facts in the record to resolve this dispute. Moreover, the State has now conceded that children born of artificial insemination should have both parents deemed the natural parents, whether same-sex or opposite sex, under Ark. Code Ann. § 9-10-201 (Repl. 2015) and asserts that it will place both same-sex parents on the birth certificate under the State's new interpretation of this statute. This statute provides that "[a]ny child born to a married women by means of artificial insemination shall be deemed the legitimate natural child of the women and the women's husband [read spouse] if the [spouse] consents in writing to the artificial insemination." Ark. Code Ann. § 9-10-201(a). It is likely, therefore, that a same-sex couple will now have both spouses' names listed on the original birth certificate without a court order, so long as the child was conceived via artificial insemination, the same-sex marriage occurred prior to the insemination, and the non-biological parent consented to the insemination. Appellants and appellees both conceded at oral argument this would resolve the challenge by two of the three same-sex marriage couples. Thus, any legal challenge in this regard could be moot if the trial court finds that the facts are as presented at oral argument.

The case thus shifts to whether section 20-18-406, which provides for the issuance of new birth certifi-

cates, is constitutional. This statute allows the registrar to issue a new certificate upon "any evidence, as required by regulation, proving that the person has been legitimated." Ark. Code Ann. § 20-18-406(a)(2) (Repl. 2014). The department currently has a regulation that provides for legitimation upon "an affidavit of paternity signed by the natural parent of said child, together with a certificate copy of the parents' marriage record." Ark. Admin. Code § 007.12.1-5.2. The State claims that the affidavit of paternity requires the parent to swear to *biological* parentage. Thus, it maintains, the regulation survives an equal-protection challenge because it discriminates on biology rather than sexual orientation. However, because the circuit court did not have this affidavit before it, neither it nor this court can consider whether the State's contention is sufficient to survive rational- basis review. In other words, the both parties failed to prove entitlement to summary judgment regarding this statute because this critical material fact is still in dispute.

This court considers only the record before us and the arguments presented to the trial court. E.g., *Dodge v. Lee*, 352 Ark. 235, 236-37, 100 S.W.3d 707, 709 (2003) (noting the well-settled "rule that matters outside the record will not be considered on appeal"). Clearly, this fluid situation has caused the facts to change from when the circuit court granted summary judgment until now. It is doubtful whether the material statements made by the registrar in her affidavit, though correct at the time, still exist today. Nor had the State conceded below, as it has done on appeal, that some of the plaintiffs were entitled to relief under another statute. We should apply the prudential-mootness doctrine, refrain from addressing the constitutional challenges, and remand for

the circuit court to consider the case in light of the now-disputed facts and the State's concession. We will not be the only court to have done so on birth-certificate issues arising from *Obergefell*. *See Marie v. Mosier*, __F. Supp. 3d __, 2016 WL 3951744 (D. Kansas Jul. 22, 2016).

A remand to the circuit court would also give the legislature time in the upcoming session to amend the birth-certificate statutes to comply with *Obergefell*. In fact, the State argued that the legislature is the proper forum to address this issue. I also depart from the majority regarding its interpretation of *Obergefell*. There, the Court concluded that state-law bans on same-sex marriage violated the equal-protection clause of the Fourteenth Amendment. In addition to this, the Court concluded that same-sex marriage bans also violated the Due Process Clause. 135 S. Ct. at 2604. But focusing on equal protection, the Court held that "same-sex couples may exercise the fundamental right to marry." *Id.* at 2604-05. And earlier in the opinion, the Court noted that "birth and death certificates" were "aspects of marital status." *Id.* at 2601. Thus, in my view, states cannot constitutionally deny same-sex couples the benefits to marital status, which include equal access to birth certificates. To bring our state laws in compliance with *Obergefell*, the legislature may choose to either amend the statute to apply neutrally to same-sex marriages or base the benefit on something other than marital status. For these reasons, I cannot join the majority opinion.

Last, I have not participated in the majority's decision to admonish the circuit court.

APPENDIX D

SUPREME COURT OF ARKANSAS

No. CV-15-988

Opinion Delivered December 8, 2016

NATHANIEL SMITH, M.D., MPH, DIRECTOR OF THE ARKANSAS DEPARTMENT OF HEALTH, IN HIS OFFICIAL CAPACITY, AND HIS SUCCESSORS IN OFFICE,
Appellant

v.

MARISA N. PAVAN AND TERRAH D. PAVAN, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF T.R.P., A MINOR CHILD; LEIGH D.W. JACOBS AND JANA S. JACOBS, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF F.D.J., A MINOR CHILD; COURTNEY M. KASSEL AND KELLY L. SCOTT, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF A.G.S., A MINOR CHILD,
Appellees

Dissenting In Part

Paul E. Danielson, Associate Justice

I disagree with the majority's holdings. I would affirm the circuit court's order because the result reached therein was compelled by both the Pulaski County Circuit Court's orders in *Wright v. Smith*, 60CV-13-2662, *appeal dismissed sub nom. Smith v. Wright*, 2015 Ark. 298 (per curiam), and by the United States Supreme

Court's decision in *Obergefell v. Hodges*, __U.S. ___, 135 S. Ct. 2584 (2015).

First, the Pulaski County Circuit Court in *Wright* entered a permanent injunction enjoining all defendants in that case, which included Smith, from enforcing any state or local laws or regulations that denied same-sex married couples "the rights, recognition and benefits associated with marriage in the State of Arkansas." *Wright v. Smith*, 60CV-13-2662 (*Pulaski Cty. Cir. Ct.* May 15, 2014). In fact, the circuit court explicitly granted "all" of the injunctive relief requested by the plaintiffs in *Wright*, including requiring Smith and his successors in office to issue birth certificates for children born to same-sex marriages reflecting both names of the married parents. *See id.* The majority's statement that the *Wright* injunction had nothing to do with birth certificates is simply and demonstrably wrong. And because this court dismissed as moot the appeal in *Smith v. Wright*, 2015 Ark. 298, the injunction stands to this day. This issue was actually litigated in *Wright* and was determined by a valid and final judgment; accordingly, relitigation of the same issue in the instant case is barred by collateral estoppel, the issue-preclusion facet of res judicata. *See, e.g., Graham v. Cawthorn*, 2013 Ark. 160, 427 S.W.3d 34.

I note Smith's argument that the *Wright* injunction failed to meet the specificity requirement of Arkansas Rule of Civil Procedure 65(d) and (e) (2016). However, as the circuit court pointed out, that argument is a collateral attack on the judgment. *See Rose v. Harbor E., Inc.*, 2013 Ark. 496, 430 S.W.3d 773 (citing *Hooper v. Wist*, 138 Ark. 289, 211 S.W. 143 (1919)) (stating that a collateral attack upon a judgment has been defined to mean any proceeding in which the integrity of a judg-

ment is challenged, except those made in the action wherein the judgment is rendered, or by appeal, and except suits brought to obtain decrees declaring judgments to be void ab initio). Judgments may not be collaterally attacked unless the judgment is void on the face of the record or the issuing court did not have proper jurisdiction. *See id.* Smith's remedy for any purported failure of specificity in the *Wright* orders was an appeal.

Second, the United States Supreme Court held in *Obergefell* that states are not free to deny same-sex couples "the constellation of benefits that the States have linked to marriage." ___U.S. at ___, 135 S. Ct. at 2601. Importantly, the Court listed "birth and death certificates" specifically as one of those benefits attached to marital status. *Id.* Thus, the majority is clearly wrong in holding that *Obergefell* has no application here. Indeed, one of the cases on review in *Obergefell*, *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014), *rev'd sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), involved a same-sex married couple who challenged the Tennessee law providing that their child's nonbiological parent would not be recognized as the child's parent, which affected various legal rights that included the child's right to Social Security survivor benefits, the nonbiological parent's right to hospital visitation, and the nonbiological parent's right to make medical decisions for the child.

Furthermore, one of the four principles discussed by the Court in *Obergefell*, for purposes of demonstrating that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples, is that the right to marry "safeguards children and families and thus draws meaning from related rights of

childrearing, procreation, and education. ___U.S. at ___, 135 S. Ct. at 2600. The opinion makes clear that the protection of children and the stability of the family unit was a foundation for the Court's decision:

> Under the laws of the several States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." Marriage also affords the permanency and stability important to children's best interests. . . .
>
> . . . .
>
> Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.

Obergefell, ____ U.S. at ____, 135 S. Ct. at 2600-01 (internal citations omitted).

The majority errs in suggesting that the right to be named as a parent on a birth certificate is not a benefit

associated with marriage and likewise errs in holding that the specific statutes at issue here focus on biological relationships rather than marital ones. Arkansas Code Annotated section 20-18-401 (f) (Repl. 2014) provides that the name of the "husband" of the mother shall be entered on a birth certificate as the father of the child, without regard to any biological relationship and on the sole basis of his marriage to the mother—specifically, if he is married to the mother at the time of either conception or birth or between conception and birth. The obvious reason for this is to legitimate children whenever possible, even when biological ties do not exist. Thus, there can be no reasonable dispute that the inclusion of a parent's name on a child's birth certificate is a benefit associated with and flowing from marriage. *Obergefell* requires that this benefit be accorded to same-sex spouses and opposite-sex spouses with equal force.

Additionally, I dissent from the majority's decision to admonish the circuit judge for his critical comments. As the Supreme Court of the United States has recognized, a major purpose of the First Amendment is to "protect the free discussion of governmental affairs." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). This includes discussion of"[t]he operations of the courts and the judicial conduct of judges," which are "matters of utmost public concern." *Id.* at 839. Injury to official reputation is an insufficient reason for repressing speech that is otherwise free, and speech cannot be punished when the purpose is simply "to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democra-

cy other public servants are exposed." *Id.* at 842 (quoting *Bridges v. California*, 314 U.S. 252, 292 (1941) (Frankfurter, J., dissenting)). In the words of Justice Frankfurter,

> Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Just because the holders of judicial office are identified with the interests of justice they may forget their common human frailties and fallibilities. There have sometimes been martinets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt.

Bridges, 314 U.S. at 289 (Frankfurter, J., dissenting).

Moreover, the Court has cautioned against repressing speech under the guise of promoting public confidence in the integrity of the judiciary:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited,

> solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Bridges, 314 U.S. at 270-71 (footnote omitted). In short, the fact that members of this court have personally taken offense to the circuit judge's remarks is not a sufficient basis for suggesting that those remarks violate our disciplinary rules.

For these reasons, I dissent.

APPENDIX E

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS SIXTH DIVISION

CASE NO. 60CV-15-3153

MARISA N. PAVAN and TERRAH D.PAVAN, individually and as parents, next friends, and guardians of T.RP., a minor child, LEIGH D.W.JACOBS and JANA S. JACOBS, individually, and as parents, next friends, and guardians of F.D.J., a minor child, COURTNEY M. KASSEL and KELLY L. SCOTT, individually, and as parents, next friends, and guardians of A.G.S., a minor child,
Plaintiffs

v.

NATHANIEL SMITH, MD, MPH, Director of the Arkansas Department of Health, in his official capacity, and his successors in office,
Defendant

MEMORANDUM OPINION

This case was submitted to the court on cross-motions for summary judgment. A hearing was conducted on Monday, November 23, 2015. At the conclusion of the bearing, the court orally ordered from the bench that the defendant was to immediately issue amended certificates of birth to each of the three plaintiff couples evidencing both spouses as the parents of their respective minor children. The court took under advisement all further rulings pending issuance of a written decision. This *Memorandum Opinion* is issued

in conjunction with the Order filed on even date herewith in this case.

SUMMARY OF MATERIAL FACTS

The parties have filed cross-motions for summary judgment in which each side avers there are no material facts in dispute.[1] After reviewing the parties' pleadings the court agrees with the litigants.

The plaintiffs Pavan are a same-sex couple legally married in New Hampshire in 2011. The minor child T.R.P. was born in Arkansas in May of 2015. The Pavans completed the birth certificate form at the hospital indicating they were married and the parents of the minor child. The Arkansas Department of Health, Bureau of Vital Statistics did not include Marisa Pavan on the original birth certificate. In July of 2015, the Pavans requested that the birth certificate be amended to show them both as the minor's parents. The Arkansas Department of Health refused to amend the birth certificate absent a court order.

The plaintiffs Jacobs are a same-sex couple legally married in Iowa in 2010. The minor child F.D.J. was born in Arkansas in June of 2015. The Jacobs completed the birth certificate form at the hospital indicating they were married and the parents of the minor child. The Arkansas Department of Health, Bureau of Vital

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[1] The only disputed fact between the parties is whether without court action In this matter, the minor children of the plaintiffs can be added to health insurance plans as dependents. The court agrees with the State that such factual dispute is not material to resolution of the Plaintiffs' constitutional claims by summary proceeding.

Statistics did not include Jana Jacobs on the original birth certificate. In July of 2015, the Jacobs requested that the birth certificate be amended to show them both as the minor's parents. The Arkansas Department of Health refused to amend the birth certificate absent a court order.

Plaintiffs Kassel and Scott are a same-sex couple who were married on July 1, 2015 in Arkansas. The minor child A.G.S. was born in January of 2015. Only one of the two plaintiffs was included on the original birth certificate. Subsequent to their marriage, the plaintiffs Kassel and Scott were told by the Arkansas Department of Health that it would not amend the birth certificate to include both plaintiffs as parents absent a court order.

***Wright v. State*, 60CV•13-2662 and**
***Smith v. Wright*, 2015 Ark. 298 (June 26, 2015)**

The Arkansas litigation challenging the ban on same-sex marriage was filed in Pulaski County as *Wright v. State*, 60CV-13-2662. The defendant in the present case, Nathaniel Smith, was also a named defendant in *Wright*. He was named both times in his official capacity as either Acting Director or Director of the Arkansas Department of Health. The Bureau of Vital Statistics is a division of the Arkansas Department of Health and is the state agency charged with maintenance of vital records, including the issuance of certificates of birth and amended certificates of birth. *See*, A.C.A. § 20-18•20 1.

The defendant appealed the trial court's decision in *Wright*, the case being styled as *Smith v. Wright* on appeal. The Arkansas Supreme Court entered an *Order*

dismissing that appeal on June 26, 2015. See, *Smith v. Wright*, 2015 Ark. 298 (June 26, 2015).

The *Wright* plaintiffs filed a *Motion for Summary Judgment* on February 26, 2014. In their prayer for relief, the plaintiffs requested that the court issue a permanent mandatory injunction as follows:

> [R]equiring Defendant Nathaniel Smith, M.D., as interim director of the Arkansas Department of Health, and his successors, to henceforth issue birth certificates for children born of marriages between members of the same sex that were entered into in other states to reflect that the married parents are the parents of the children born of the marriage; and, also, requiring said Defendant to issue amended birth certificates to any married couples of the same sex that previously gave birth to children in Arkansas to reflect that the married parents arc the parents of the children born of this marriage.

The trial court in *Wright* entered Summary Judgment in favor of the plaintiffs on May 9, 2014. On May 15, 2014, the trial court issued a *Final Judgment and Rule 54(b) Certification*. The *Final Judgment* reads, in relevant part, that:

> [I]t is and was the intent of the Order to grant Plaintiffs' Motion for Summary Judgment without exception and as to all injunctive relief requested therein. In fact, this was the expressly stated title of the May 9, 2014 Order.

RES JUDICATA

The Arkansas Supreme Court recently addressed the principle of *res judicata* in the case of *Abraham v. Beck*, 2015 Ark. 80, 456 S.W.3d 744, 2015 LEXIS 88, where it stated:

> The concept of res judicata has two facets, one being issue preclusion and the other claim preclusion. *Huffman v. Alderson*, 335 Ark. 411,414,983 S.W.2d 899, 901 (1998) ... Collateral estoppel, also known as issue preclusion, bars relitigation of issues of law or fact previously litigated by a party. *Johnson v. Union Pac. R.R.*, 352 Ark. 534, 544, 104 S.W.3d 745, 750 (2003). The elements of collateral estoppel are as follows; (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) the issue must have been actually litigated; (3) it must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment. *Id.* In *Johnson v. Union Pacific R.R.*, this court adopted the offensive use of collateral estoppel, which prevents a defendant from relitigating a defense, approved by the United States Supreme Court in *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 99 S. Ct. 645, 58 L.E. 2d 552 (1979). This court held that the offensive use of collateral estoppel should be available only in limited cases, and that the trial court should be given broad discretion to determine if it should be applied.

Defendant Smith has raised the issue that Judge Piazza's *Final Judgment* didn't strictly comply with

Rule 65(d) of the Arkansas Rules of Civil Procedure concerning the specificity of injunctive language. This is an issue that could have been and should have been raised by the defendant Smith in the appeal in *Wright*. When the Arkansas Supreme Court dismissed *Wright* as being moot in light of the decision in *Obergefell v. Hodges*, 567 U.S. __ (2015), the defendant Smith again had the opportunity to point out to the Court that all of the issues involved in the injunction had not been conclusively resolved by *Obergefell*. Collateral attacks on judgments are only allowed if there are allegations of fraud or lack of jurisdiction.[2]

It is clear with respect to the claims of the plaintiffs Pavan and Jacobs that the issu.es before the court now were fully and completed litigated in the *Wright* case, and that the *Wright* injunction is res judicata and binding upon the defendant Smith.

DECLARATORY JUDGMENT AS TO THE CONSTITUTIONALITY OF A.C.A. §20-18-401 AND A.C.A. §20-18-406

The plaintiffs seek declaratory judgment alleging that two statutes addressing birth certificates are unconstitutional in whole or part pursuant to the United States Supreme Court decision in *Obergefell*. The subject statutes are A.C.A. § 20-18-401 and A.C.A. § 20-18-406.[3]

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[2] *See, Fannie Mae v. Taylor*, 2015 Ark. 78,455 S.W.3d 811,2015 Ark. LEXIS 79, and *Powers v. Bryant*, 309 Ark. 568, S71, 832 S.W.2d 232, 233 (1992).

[3] 20-18-401. **Birth Registration generally.**
(a) A certificate of birth for each live birth which occurs in this state shall be flied with the Division of Vital Records of the Department of Health. or as otherwise directed by the State Regis-

trar of Vital Records, within ten (10) days after the birth and shall be registered if it has been completed and filed in accordance with this section.

(b) When a birth occurs in an institution or en route thereto, the person in charge of the institution or his or her authorized designee shall obtain the personal data, prepare the certificate, certify that the child was born alive at the place, time, and date stated on the certificate either by signature or in an approved electronic process, and file the certificate as directed in subsection (a) of this section. The physician or other person in attendance shall provide the medical information required by the certificate within seventy-two hours after the birth.

(c) When a birth occurs outside an institution:

(1) The certificate shall be prepared and filed by one (1) of the following in the indicated order of priority:

(A) The physician in attendance at or immediately after the birth, or in the absence of such a person;

(B) Any other person in attendance at or immediately after the birth, or in the absence of such a person; or

(C) The father, the mother, or in the absence of the mother, the person in charge of the premises where the birth occurred and

(2) The division shall determine what evidence may be required to establish the fact of birth.

(d) When a birth occurs on a moving conveyance within the United States and the child is first removed from the conveyance in this state, the birth shall be registered in this state and the place where it is first removed shall be considered the place of birth. When a birth occurs on a moving conveyance while in international waters or air space or in a foreign country or its air space and the child is first removed from the conveyance in this state, the birth shall be registered in this state, but the certificate shall show the actual place of birth insofar as can be determined.

(e) For the purposes of birth registration, the mother is deemed to be the woman who gives birth to the child, unless otherwise provided by state law or determined by a court of competent jurisdiction prior to the filing of the birth certificate. The information about the father shall be entered as provided in subsection (f) of this section.

(f)(l) If the mother was married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child, unless:

(A) Paternity has been determined otherwise by a court of competent jurisdiction; or

(B) The mother executes an affidavit attesting that the husband is not the father and that the putative father is the father, and the putative father executes an affidavit attesting that he is the father and the husband executes an affidavit attesting that he is not the father. Affidavils may be joint or individual or a combination thereof, and each signature shall be individually notarized. In such event, the putative father shall be shown as the father on the certificate and the parents may give the child any surname they choose.

(2) If the mother was not married at the time of either conception or birth or between conception and birth. the name of the father shall not be entered on the certificate of birth without an affidavit of paternity signed by the mother and the person to be named as the father. The parents may give the child any surname they choose.

(3) In any case. in which paternity of a child is determined by a court of competent jurisdiction, the name of the father and surname of the child shall be entered on the certificate of birth in accordance with the finding and order of the court.

(4) If the father is not named on the certificate of birth, no other information about the father shall be entered on the certificate.

(g) Either of the parents of the child or other informant shall verity by signature or electronic process the accuracy of the personal data to be entered on the certificate in time to permit the filing of the certificate within the ten (10) days prescribed in this section.

(h) Certificates of birth filed after ten (10) days but within one (1) year from the date of birth shall be registered on the standard form of live birth certificate in the manner prescribed in this section. Such certificates shall not be marked "DELAYED". The state registrar may require additional evidence in support of the facts of birth.

20-18-406. New certificates.

(a) The State Registrar of Vital Records shall establish a new certificate of birth for a person born in this state when he or she receives the following:

(1) A certificate of adoption as provided in 2018-405 [repealed], or a certificate of adoption prepared and filed in accordance with the laws of another state or foreign country, or a certified copy of the decree of adoption, together with the information necessary to identify the original certificate of birth and to establish a new certificate of birth. However, a new certificate of birth shall not be established if so requested by the court decreeing the adoption, the adoptive parents, or the adopted person;

(2) A request that a new certificate be established and any evidence, as required by regulation, proving that the person has been legitimated, or that a court of competent jurisdiction has determined the paternity of the person or that both parents have acknowledged the paternity of the person and request that the surname be changed from that shown on the original certificate.

(b) When a new certificate of birth is established, the actual city or county, or both, and date of birth shall be shown. The new certificate shall be substituted for the original certificate of birth. Thereafter, the original certificate and the evidence of adoption, paternity determination, or legitimation shall not be subject to inspection except upon order of an Arkansas court of competent Jurisdiction or as provided by regulation.

(c) Upon receipt of a report of an amended certificate of adoption, the certificate of birth shall be amended as provided by regulation.

(d) Upon receipt of a report of annulment of adoption, the original certificate of birth shall be restored to its place in the files, and the new certificate and evidence shall not be subject to inspection except upon order of a court of competent jurisdiction or as provided by regulation.

(e) Upon written request of both parents and receipt of a swarn acknowledgment of paternity signed by both parents or a child born out of wedlock, the state registrar shall reflect paternity on the certificate of birth in the manner prescribed by regulation if paternity is not already shown on the certificate of birth.

(f)(1) Upon request, the state reg1strar shall prepare and register an Arkansas certificate of birth for a person born in a foreign country, who is not a citizen of the United States, and for whom a final

It is well settled under the doctrine of separation of powers that it is not the business of the courts or of the executive branch to legislate. *See, Ark. State Bd. Of Election Comm'rs v. Pulaski County Election Commission*, 2014 Ark. 236, 437 S.W.3d 80, 2014 LEXIS 367. Further, the courts have a duty to only declare unconstitutional those portions of an Act that are unconstitutional, and if the constitutional remainder remains complete in itself, the court's obligation is to uphold that portion of the legislation. *See, Seagrave v. Price*, 349 Ark. 433, 79 S.W.3d 339, 2002 LEXIS 393 (2002),

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order of adoption has been entered In a court of competent jurisdiction in Arkansas when he or she receives the following:

(A) A certificate of adoption as provided in 20-18-405 [repealed];

(B) Proof of the date and place of the adopted child's birth:

(C) A request by the court decreeing the adoption, the adoptive parents, or the adopted person if eighteen (18) years of ago or older.

(2) After preparation of the birth certificate in the new name of the adopted person, the state registrar shall seal and file the certificate of adoption. This certificate shall not be subject to Inspection except upon order of a court of competent jurisdiction or as provided by regulation or as otherwise provided by state law.

(3) The birth certificate shall show the actual foreign country of birth and shall state that the certificate is not evidence of United States citizenship for the child for whom it is issued.

(g) Either of the parents of the child or other informant shall verity by signature or electronic process the accuracy of the personal data to be entered on the certificate in time to permit the filing of the certificate within the ten (10) day prescribed in this section.

(h) Certificates of birth filed after ten (10) days but within one (1) year from the date of birth shall be registered on the standard form of live birth certificate in the manner prescribed in this section. Such certificates shall not be marked "DELAYED". The state registrar may require additional evidence in support of the facts of birth.

quoting *Levy v. Albright*, 204 Ark. 657, 163 S.W.2d 529 (1942).

The defendant Smith states on page 5 of his *Brief in Support of Defendant's Motion for Summary Judgment*, that:

> As explained below, Plaintiffs' constitutional challenges fail because parental rights, and parental designations on birth certificates, do not arise from marital relationships. Plaintiffs' claims conflate statutorily distinct legal categories of marriage, vital records, and parental rights. In Arkansas and most states, and under the common law that predates statutory law, parental rights arise from biological parentage, not from marriage.

The defendant's argument on this point is supported collaterally by the definition of "parent" as defined in A.C.A. § 9-27-303(40) [4]

Defendant's argument is legally well fashioned and has been extremely well argued but it is not correct factually with respect to the actual language of A.C.A. § 20-18-401. In that statute, the General Assembly has intertwined the concepts of "parent" with certain rights and presumptions occurring within a marital relation-

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[4] "Parent" is defined in § 9-27-303(40) as a "biological mother, an adoptive parent, or a man to whom the biological mother was married at the time of conception or birth or who has signed an acknowledgment of paternity pursuant to § 9-10-120 or who has been found by a court of competent jurisdiction to be the biological father of the juvenile." This definition is from the Arkansas Juvenile Code subchapter of the Family Law title, but is instructive of the type of present code language that exists which may need to be changed as a result of the *Obergefell* decision.

ship, using now impermissible limiting spousal terms of "husband" and "wife." Such language categorically prohibits every same-sex married couple, regardless of gender, from enjoying the same spousal benefits which are available to every opposite-sex married couple.

The majority of A.C.A. § 20-18-401 remains constitutional under *Obergefell*. The stricken parts below are declared unconstitutional, the remainder is constitutional:

20-18-401. **Birth Registration generally.**

(a) A certificate of birth for each live birth which occurs in this state shall be flied with the Division of Vital Records of the Department of Health or as otherwise directed by the State Registrar of Vital Records, within ten (10) days after the birth and shall be registered if it has been completed and filed in accordance with this section.

(b) When a birth occurs in an institution or en route thereto, the person in charge of the institution or his or her authorized designee shall obtain the personal data, prepare the certificate, certify that the child was born alive at the place, time, and date stated on the certificate either by signature or in an approved electronic process, and file the certificate as directed in subsection (a) of this section. The physician or other person in attendance shall provide the medical information required by the certificate within seventy-two hours after the birth.

(c) When a birth occurs outside an institution:

(1) The certificate shall be prepared and filed by one (1) of the following in the indicated order of priority:

(A) The physician in attendance at or immediately after the birth, or in the absence of such a person;

(B) Any other person in attendance at or immediately after the birth, or in the absence of such a person; or

(C) The father, the mother, or in the absence of the mother, the person in charge of the premises where the birth occurred and

(2) The division shall determine what evidence may be required to establish the fact of birth.

(d) When a birth occurs on a moving conveyance within the United States and the child is first removed from the conveyance in this state, the birth shall be registered in this state and the place where it is first removed shall be considered the place of birth. When a birth occurs on a moving conveyance while in international waters or air space or in a foreign country or its air space and the child is first removed from the conveyance in this state, the birth shall be registered in this state, but the certificate shall show the actual place of birth insofar as can be determined.

(e) ~~For the purposes of birth registration, the mother is deemed to be the woman who gives birth to the child, unless otherwise provided by state law or determined by a court of competent jurisdiction prior to the filing of the birth certificate. The information about the father shall be entered as provided in subsection (f) of this section.~~

~~(f)(1) If the mother was married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child, unless:~~

~~(A) Paternity has been determined otherwise by a court of competent jurisdiction; or~~

~~(B) The mother executes an affidavit attesting that the husband is not the father and that the putative father is the father, and the putative father executes an affidavit attesting that he is the father and the husband executes an affidavit attesting that he is not the father. Affidavits may be joint or individual or a combination thereof, and each signature shall be individually notarized. In such event, the putative father shall be shown as the father on the certificate and the parents may give the child any surname they choose.~~

(2) ~~If the mother was not married at the time of either conception or birth or between conception and birth, the name of the father shall not be entered on the certificate of birth without an affidavit of paternity signed by the mother and the person to be named as the father.~~ The parents may give the child any surname they choose.

~~(3) In any case in which paternity of a child is determined by a court of competent jurisdiction, the name of the father and surname of the child shall be entered on the certificate of birth in accordance with the finding and order of the court.~~

~~(4) If the father is not named on the certificate of birth, no other information about the father shall be entered on the certificate.~~

(g) Either of the parents of the child or other informant shall verity by signature or electronic process the accuracy of the personal data to be entered on the certificate in time to permit the filing of the certificate within the ten (10) days prescribed in this section.

(h) Certificates of birth filed after ten (10) days but within one (1) year from the date of birth shall be registered on the standard form of live birth certificate in the manner prescribed in this section. Such certificates shall not be marked "DELAYED". The state registrar may require additional evidence in support of the facts of birth.

The nonstricken portions allow either spouse, as the parents of the child—without gender restrictive language—to provide the personal data to either the hospital, if it is a hospital birth, or for either of the spouses to give that information directly to the Arkansas Department of Health in the event of a non hospital birth.

In analyzing the challenge to A.C.A. § 20-18-406, a separate rule of statutory construction is applicable. It is the court's obligation, if possible, to interpret a statute as constitutional if such interpretation can reasonably be reached. The use of the term "legitimated" occurs only twice in the entire Arkansas Code. Once in A.C.A. § 20-18-406(a)(2) in the phrase, "that the person has been legitimated," and one other time, also in Title 20. "Legitimated" is not a legislatively defined term, it is only defined by State Board of Health regulation, and is therefore subject to reasonable judicial interpretation in order to insure A.C.A. § 20-18-406 is constitutional, as presently written.

In light of the decision in *Obergefell*, and in addition to any other meaning presently given to the term by existing case law, the phrase "person has been legitimated, is declared to include the minor children of any couple—same-sex or opposite-sex—who married subsequent to the birth of the minor child, and who present

proof to the Arkansas Department of Health of the date of birth of the minor child and of the date of their marriage. In the event any biological parent is listed on a birth certificate sought to be amended, a court order shall be requited before an amended certificate is issued which removes such person(s) name. In the event one or both of the spouses was married to another individual at any time from the birth of the minor child forward, no amended birth certificate shall be issued absent a court order naming the current spouses as the parents of the minor child.

This court-ordered definition of the phrase will allow the Department of Health to immediately begin issuing amended birth certificates to same-sex couples without requiring the State Board of Health to first amend its regulations. This interpretation also gives both the State Board of Health and the General Assembly the time to fully and completely consider all viewpoints prior to promulgating any rule changes or amending the subject legislation.

LEGAL EFFECT OF DECLARATORY JUDGMENT

From their own different litigation perspectives, the parties have each touched on a very important legal issue. The plaintiffs framed the issue by averring that issuance of a decision acknowledging their constitutional right to be treated the same as opposite-sex married couples with respect to being named as parents on birth certificates, would be a panacea with respect to a litany of potential legal issues[5] created by the decision in *Obergefell*. The defendant Smith first argues that the

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[5] *Complaint for Declaratory and Injunctive Relief*, Paragraph 31.

Department of Health only has a non-discretionary ministerial duty to issue and amend birth certificates in accordance with applicable statutes and regulations[6], but then attempts to become the advocate for the minor children involved by alleging that the relief requested by the plaintiffs is contrary to the 'best interests of the minor children.'"[7]

In cases involving title to real property, the execution of a deed, whether warranty or quitclaim, is only evidence of title between the parties to the deeds, and does not affect the rights of anyone else in the entire world. The proper way to obtain good and valid title against the entire world is to institute and prosecute a quiet title action. At the end of such proceeding, provided that all persons who may claim interest in the real property have been made parties, the court issues a decree vesting title in the claimant. This legal scenario is analogous to that presented in the present case. The defendant Smith, in his pleadings, correctly warns the plaintiffs of potential future problems.

The *Obergefell* case was decided less than six months ago. In the years to come it will cause significant changes to established law in many areas. Those cases are not before the court, nor are the legal issues that will be presented by those cases being decided in this case. Today's decision affords the plaintiffs, as same-sex couples, the same constitutional rights with

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[6] Defendant's Reply in Support of Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment, p. 2.

[7] Defendant's Reply in Support of Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment, pp. 5-7.

respect to the issuance of birth certificates and amended birth certificates as opposite-sex couples. That is the sum total of the legal effect of this decision.

In paragraph 31 of their Complaint, the plaintiffs list eight specific examples of how the failure to include both same-sex spouses on birth certificates or amended birth certificates may adversely affect legal status with respect to the minor children. The list includes: identification procedures for Social Security numbers and passports, denial of the right to authorize medical care for the minor, denial of the right to authorize school related activities, denial of the right to apply for needed governmental or employment related benefits, denial of survivor benefits in the case of death of one of the spouses, denial to the child of inheritance rights, disruption of the parent-child relationship in the event of divorce of the same-sex couple, and the award of child support in the event of divorce of a same-sex couple. The court's declaration today does not conclusively resolve any of those legal issues. It may create equitable and legal arguments for resolution of issues that involve only the two spouses of the same sex-marriage, such as child support or child custody. It does not in any manner resolve the multitude of legal issues that may arise involving third parties. Biological parents, mother or father, whose statutory and/or common law rights may not have been properly terminated, whether through an adoption proceeding or by the signature of surrogacy documents, are not bound by the listing of two names on a birth certificate. Other heirs claiming against a same-sex spouse estate, or attempting to disallow a minor child's interest in the estate of one of the same-sex spouses, are not bound by an amended birth certificate. Insurance companies—life, health, or casu-

alty—may decide in order to prevent potential duplication of claims, or liabilities not actuarially considered in premium calculations, to change their contract language to exclude birth certificates as indicia of acceptable legal relationship, and may require other documentation such as adoption decrees. In the future, government benefits, both state and federal, may key off of legal documentation other than a birth certificate. Today's decision does not legally resolve any of those potential issues. The defendant Smith addresses these potential legal problems several times in his pleadings, and the warnings have substance to them. The plaintiffs are constitutionally entitled to the declaration issued today by the court, but the only way for same sex couples to foreclose potential future legal problems involving their minor children is the exact same way that opposite-se couples, who are not both the biological parents of the minor child or children, must follow. There must be a court-approved adoption, or surrogacy contracts must be executed in accordance with statutory procedure, or any of the other statutorily approved methods for legally foreclosing all other individuals from claiming parentage of the minor child or children must be utilized.

IT IS SO ORDERED.

/s/ Timothy Davis Fox
TIMOTHY DAVIS FOX
CIRCUIT JUDGE

12-1-2015
DATE

APPENDIX F

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS SIXTH DIVISION

CASE NO. 60CV-15-3153

MARISA N. PAVAN and TERRAH D.PAVAN, individually and as parents, next friends, and guardians of T.RP., a minor child, LEIGH D.W.JACOBS and JANA S. JACOBS, individually, and as parents, next friends, and guardians of F.D.J., a minor child, COURTNEY M. KASSEL and KELLY L. SCOTT, individually, and as parents, next friends, and guardians of A.G.S., a minor child,
Plaintiffs

v.

NATHANIEL SMITH, MD, MPH, Director of the Arkansas Department of Health, in his official capacity, and his successors in office,
Defendant

ORDER

On the 23rd day of November, 2015 came on for hearing the pending motions in this matter, and from the pleadings filed herein, together with all material s properly attached to such pleadings, and the argument of counsel, the court doth order as follows:

1. *The Motion for Summary Judgment* of plaintiffs Marisa Pavan and Terrah Pavao, individually, filed on October 1, 2015, is granted in part and denied in part, as set forth more fully in the court's *Memorandum Opinion*. The *Motion for Summary Judgment*, of plain-

tiffs Marisa Pavan and Terrah Pavan, as parents, next friends, and guardians of their minor child, is denied.

2. The *Motion for Summary Judgment* of plaintiffs Leigh Jacobs and Jana Jacobs, individually, filed on October 1, 2015, is granted in part and denied in part, as set forth more fully in the court's *Memorandum Opinion*. The *Motion for Summary Judgment* of plaintiffs Leigh Jacobs and Jana Jacobs, as parents, next friends, and guardians of their minor child, is denied.

3. The *Motion for Summary Judgment* of plaintiffs Courtney Kassel and Kelly Scott, individually, filed on October 1, 2015, is granted in part and denied in part, as set forth more fully in the court's *Memorandum Opinion*. The *Motion for Summary Judgment* of plaintiffs Courtney Kassel and Kelly Scott, as parents, next friends, and guardians of their minor child, is denied.

4. Defendant's *Motion for Summary Judgment*, filed on August 13, 2015, is granted in part and denied in part. Summary judgment is granted with respect to the claims of the plaintiffs as parents, next friends, and guardians of their respective minor children, and all causes of action by the plaintiffs in such representative capacities are hereby dismissed with prejudice. Defendant's motion is denied with respect to all other relief requested.

5. Defendant's *Motion for Stay*, filed on November 24, 2015, is denied. The majority of the defendant's arguments are mooted by entry of this written *Order* and accompanying *Memorandum Opinion*. Any other grounds for requesting a stay are specifically rejected and denied. This court has diligently reviewed the pleadings filed in this case, together with all of the relevant case law. The court has made the best legal deci-

sion it can make, and has done so in the most judicially efficient manner available—and as promptly as possible—given the complicated nature of the arguments and the quickly evolving law.

It is important that the general public have confidence that decisions issued by the judiciary are based solely on the Rule of Law. This does not mean everyone will agree with any given decision. In fact, a substantial argument can be advanced that in a healthy, flourishing democracy there will always be some citizens who agree—and others who disagree—with every legal conclusion reached by the courts. This is true whether the subject decision is in a criminal matter, a domestic proceeding, or any type of civil case, including cases involving constitutional issues.

Unnecessary delays in the issuance of opinions, as in the recent case of *Smith v. Wright*, 2015 Ark. 298 (June 26, 2015), do not promote societal confidence in judicial decisions. Such delays provide a breeding ground for speculation of political intrigue or other illegitimate reasons for the delay—whether true or not.

The default during appeal should be in favor of affording all United States citizens their full and complete constitutional protections and rights during the appeal, not the continued deprivation of those rights. As stated by the United States Supreme Court in *Romer v. Evans*, 717 U.S. 620, 623, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), "The United States Constitution 'neither knows nor tolerates classes among citizens.' "

The Supreme Court, in *Obergefell v. Hodges*, 576 U.S. __ (2015), specifically enumerated "birth and death certificates" as benefits of marital status. The plaintiffs herein, as well as many other Arkansas citizens nega-

tively affected by the present statutory birth certificate language, were deprived for many years of their constitutional right to marriage. Those constitutional rights continued to be unnecessarily denied to them during the lengthy appeal process in *Wright*.

If, upon proper application by the State, the Arkansas Supreme Court desires to issue a stay that deprives the Plaintiffs, and all other similarly situated Arkansas citizens, of their constitutional rights pending the appeal of this matter, the Justices have been elected to judicial positions with the authority to issue such a stay. This court, however, will not allow its authority to be used to deprive these Arkansans any longer of their constitutional rights.

6. The Supreme Court issued the *Obergefell* decision in June of this year, and the full impact of such decision on many areas formerly considered to be established law will not be realized for some time. The Arkansas General Assembly has not yet even had the opportunity to meet in legislative session to begin addressing any revisions to the Arkansas Code that may be required by the *Obergefell* decision. The defendant herein has correctly pointed out that the Arkansas Department of Health, as part of the executive branch does not have the authority to enact legislation. Further, defendant also correctly states that it is the State Board of Health, not the Department of Health, which has been given the authority by the General Assembly to promulgate rules or regulations concerning certificates of birth.

The court also notes that the judicial branch does not have the authority to legislate. Enactment of legislation is the sole province of the legislative branch. The

courts do however have the authority to strike unconstitutional words and phrases from statutes, if the remaining portion makes sense as redacted. That is what the court has attempted to do in its ruling in this case, so that the State Board of Health can revise its rules and regulations concerning birth certificates to meet the constitutional parameters established in *Obergefell*. This would allow the vital statistics relating to original and amended birth certificates to be made in a constitutional and orderly manner until such time as the General Assembly can address changes to the statutory scheme.

7. The court's *Memorandum Opinion* issued on even date herewith is incorporated by reference herein as though set forth word for word.

8. If the defendant has not already complied with the court's oral instruction from the bench, it is ordered to forthwith issue amended birth certificates showing: Marisa N. Pavan and Terrah D. Pavan as the parents of T.R.P., a minor child, Leigh D.W. Jacobs and Jana S. Jacobs as the parents of F.D.J., a minor child, and Courtney M. Kassel and Kelly L. Scott, as the parents of A.G.S., a minor child.

9. This *Order* and accompanying *Memorandum Opinion* fully and completely resolve all pending issues and causes of action before the court[1] and therefore constitute a final judgment for purposes of any appeal.

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[1] The Complaint also requests the award of attorney's fees and costs. The Court has repeatedly stated the award of attorney's fees and costs is a collateral matter that does not affect the finality of a judgment. *See, Midwest Terminals of Toledo, Inc. v. Palm*, 2011 Ark. 81, 378 S.W3d 761, 2011 LEXIS 76, *Nettleton Sch. Dist. v. Owens, 329Ark. 367, 948 S.W2d 94 (1997); Marsh & Mclennan of*

IT IS SO ORDERED AND ADJUDGED.

/s/ Timothy Davis Fox
TIMOTHY DAVIS FOX
CIRCUIT JUDGE
12-1-2015
DATE

Ark. v. Herget, 321 Ark. 180, 900 S.W2d 195 (1995); and Pledger v. Bosnlck, 306Ark 45,8/1 S.W.2d 286 (1991).

APPENDIX G

U.S. Const. Amend. XIV, § 1

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H

Arkansas Code § 9-10-201. Child born to married or unmarried woman—Presumptions—Surrogate mothers

(a) Any child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman's husband if the husband consents in writing to the artificial insemination.

(b) A child born by means of artificial insemination to a woman who is married at the time of the birth of the child shall be presumed to be the child of the woman giving birth and the woman's husband except in the case of a surrogate mother, in which event the child shall be that of:

(1) The biological father and the woman intended to be the mother if the biological father is married;

(2) The biological father only if unmarried; or

(3) The woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination.

(c) (1) A child born by means of artificial insemination to a woman who is unmarried at the time of the birth of the child shall be, for all legal purposes, the child of the woman giving birth, except in the case of a surrogate mother, in which event the child shall be that of:

(A) The biological father and the woman intended to be the mother if the biological father is married;

(B) The biological father only if unmarried; or

(C) The woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination.

(2) For birth registration purposes, in cases of surrogate mothers the woman giving birth shall be presumed to be the natural mother and shall be listed as such on the certificate of birth, but a substituted certificate of birth may be issued upon orders of a court of competent jurisdiction.

APPENDIX I

Arkansas Code § 20-18-401. Birth registration generally.

(a) A certificate of birth for each live birth which occurs in this state shall be filed with the Division of Vital Records of the Division of Health of the Department of Health and Human Services, or as otherwise directed by the State Registrar of Vital Records, within ten (10) days after the birth and shall be registered if it has been completed and filed in accordance with this section.

(b) When a birth occurs in an institution or en route thereto, the person in charge of the institution or his or her authorized designee shall obtain the personal data, prepare the certificate, certify that the child was born alive at the place, time, and date stated on the certificate either by signature or in an approved electronic process, and file the certificate as directed in subsection (a) of this section. The physician or other person in attendance shall provide the medical information required by the certificate within seventy-two (72) hours after the birth.

(c) When a birth occurs outside an institution:

(1) The certificate shall be prepared and filed by one (1) of the following in the indicated order of priority:

(A) The physician in attendance at or immediately after the birth, or in the absence of such a person;

(B) Any other person in attendance at or immediately after the birth, or in the absence of such a person;

(C) The father, the mother, or in the absence of the father and the inability of the mother, the person in charge of the premises where the birth occurred; and

(2) The Division of Vital Records shall determine what evidence may be required to establish the fact of birth.

(d) When a birth occurs on a moving conveyance within the United States and the child is first removed from the conveyance in this state, the birth shall be registered in this state and the place where it is first removed shall be considered the place of birth. When a birth occurs on a moving conveyance while in international waters or air space or in a foreign country or its air space and the child is first removed from the conveyance in this state, the birth shall be registered in this state, but the certificate shall show the actual place of birth insofar as can be determined.

(e) For the purposes of birth registration, the mother is deemed to be the woman who gives birth to the child, unless otherwise provided by state law or determined by a court of competent jurisdiction prior to the filing of the birth certificate. The information about the father shall be entered as provided in subsection (f) of this section.

(f) (1) If the mother was married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child, unless:

(A) Paternity has been determined otherwise by a court of competent jurisdiction; or

(B) The mother executes an affidavit attesting that the husband is not the father and that the putative father is the father, and the putative father executes an affidavit attesting that he is the father and the husband executes an affidavit attesting that he is not the father. Affidavits may be joint or individual or a combination thereof, and each signature shall be individually notarized. In such event, the putative father shall be shown as the father on the certificate and the parents may give the child any surname they choose.

(2) If the mother was not married at the time of either conception or birth or between conception and birth, the name of the father shall not be entered on the certificate of birth without an affidavit of paternity signed by the mother and the person to be named as the father. The parents may give the child any surname they choose.

(3) In any case in which paternity of a child is determined by a court of competent jurisdiction, the name of the father and surname of the child shall be entered on the certificate of birth in accordance with the finding and order of the court.

(4) If the father is not named on the certificate of birth, no other information about the father shall be entered on the certificate.

(g) Either of the parents of the child or other informant shall verify by signature or electronic process the accuracy of the personal data to be entered on the certificate in time to permit the filing of the certificate within the ten (10) days prescribed in this section.

(h) Certificates of birth filed after ten (10) days but within one (1) year from the date of birth shall be regis-

tered on the standard form of live birth certificate in the manner prescribed in this section. Such certificates shall not be marked "Delayed". The state registrar may require additional evidence in support of the facts of birth.

APPENDIX J

SUPREME COURT OF ARKANSAS

No. CV-15-988

NATHANIEL SMITH, M.D., MPH, DIRECTOR OF THE ARKANSAS DEPARTMENT OF HEALTH, IN HIS OFFICIAL CAPACITY, AND HIS SUCCESSORS IN OFFICE,
Appellant

v.

MARISA N. PAVAN AND TERRAH D. PAVAN, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF T.R.P., A MINOR CHILD; LEIGH D.W. JACOBS AND JANA S. JACOBS, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF F.D.J., A MINOR CHILD; COURTNEY M. KASSEL AND KELLY L. SCOTT, INDIVIDUALLY, AND AS PARENTS, NEXT FRIENDS, AND GUARDIANS OF A.G.S., A MINOR CHILD,
Appellees

Appeal from the Pulaski County Circuit Court
[No. 60CV-15-3153]

November 3, 2016

BEFORE:

CHIEF JUSTICE HOWARD BRILL

JUSTICE RHONDA K. WOOD

JUSTICE PAUL E. DANIELSON

JUSTICE JOSEPHINE LINKER HART

[00002] P R O C E E D I N G S

CLERK: Everyone, rise. Hear ye, hear ye, hear ye, the Arkansas Supreme Court is now in session. All persons having business before the sovereign court draw near, give attention and ye shall be heard. May God save these United States, and the State of Arkansas, and this honorable court. You may be seated.

CHIEF JUSTICE HOWARD BRILL: Good morning. The Court is handing down decisions in the following cases today: CR-16-244, Mark Aaron Looper v. the State of Arkansas from Benton County Circuit Court, affirmed.

JUSTICE PAUL E. DANIELSON: CR-16-106, Thomas Conan Ortega v. the State of Arkansas from Garland County Circuit Court, affirmed. Justice Goodson concurs, and Justice Danielson and Justice Hart dissent.

CHIEF JUSTICE HOWARD BRILL: Would the clerk read the submissions, please?

CLERK: There are four appeals being submitted to the Court for decision today. Civil Case 15-988, Nathaniel Smith and others in their capacities as Director of the Department of Health v. Marisa Ann Pavan and others from [00003] Pulaski Circuit. This case will be orally argued this morning. The other appeals are Criminal Case 15-724, Daryl Dennis v. the State of Arkansas from Pulaski Circuit, Civil Case 16-219, Tony Havner v. Northeast Arkansas Electric Cooperative and Tony L. Walker, III from Baxter Circuit. And, finally, Civil Case 16-316, Cody Ward v. Wendy Kelly as Director of the Department of Corrections from Jefferson Circuit.

There is also one petition for review of a decision from the Court of Appeals being submitted today. Criminal Case 16-540, WJS v. the State of Arkansas from Crawford Circuit. There are 16 other various motions and petitions that are being submitted to the Court today. Those are available on the Court's website.

CHIEF JUSTICE HOWARD BRILL: Thank you. We are hearing oral argument sin the case of Smith v. Pavan. The State, you may approach.

LEE RUDOFSKY: Good morning, Mr. Chief Justice, may it please the Court. My name is Lee Rudofsky. I'm the Solicitor General of Arkansas from the Arkansas Attorney General's Office. And in this case I represent Nathanial Smith in his official capacity as the Director of the Arkansas [00004] Department of Health.

I'd like to start off this morning by explaining the specific concession that the state makes in this case. If a heterosexual married couple has a baby conceived using artificial insemination from a sperm donor, the husband will be, quote-unquote, "deemed the natural legitimate father of the child under Arkansas Code 910-201." That's the Assisted Reproduction Statute.

This statute was written prior to same-sex marriage in Arkansas and therefore it used the word husband. So, under the statute, for a lesbian married couple, like two of the plaintiffs in this case, who has a baby when they're married and the baby was conceived using artificial insemination from a sperm donor, the statute doesn't deem the spouse a natural legitimate parent.

We would agree that this differential treatment fails equal protection under the plain old rational basis standard. In our view, the remedy should be to have

the Court either read or revise the word husband in the statute to mean spouse. And that's specifically the Artificial Insemination or Assisted Reproduction Statute.

[00005] If the Court did so, both women in a same-sex marriage would be, quote-unquoted, "deemed the natural legitimate parent of a child born into the marriage and conceived by artificial insemination through a sperm donation." This would mean that they would be entitled to be placed on the birth certificate initially when they were at the hospital and through the hospital's submission to the Department of Health.

It would also mean that if for some reason the spouse wasn't placed on the birth certificate, they could use the legitimation process in 2018-406A2 to get onto the birth certificate.

If that's what Judge Fox had done in this case we would not have appealed and we would not be here today. Unfortunately, that's not what Judge Fox did. Judge Fox entirely ignored the Assisted Reproduction Statute and instead, he unilaterally rewrote whole portions of the Arkansas Code. In so doing he created two very serious problems and that's the reason we're here today.

The first problem is that his rewrite [00006] of Section 2018-406 upends centuries of family law and flies in the face of clear legislative intent. Under his rewrite of that section, a person, whether heterosexual or homosexual, who is not the biological parent of a living child can get on a child's birth certificate merely by marrying that child's mother without a court ever considering whether it's in the best interest of the child to get onto the birth certificate.

This would mean that any stepparent, again, whether a heterosexual marriage or a same-sex marriage, could sidestep the required judicial review process to make sure that getting that person on the birth certificate is in the best interest of the child.

That is a century's old rule in family law. It's long been the rule that a person who marries a woman after she has had a child doesn't get on the birth certificate just by virtue of that marriage. That is what Judge Fox has changed. There was no reason for it. And that is why that part of his order should be reversed.

JUSTICE RHONDA K. WOOD: Counsel, my question is 2018--I'm sorry, 910201, that's not the statute before us. And that statute wasn't

* * * * *

[00052] Gotham Transcription states that the preceding transcript was created by one of its employees using standard electronic transcription equipment and is a true and accurate record of the audio on the provided media to the best of that employee's ability. The media from which we worked was provided to us. We can make no statement as to its authenticity.

Attested to by: Sonya Ledanski Hyde

APPENDIX K

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS CIVIL DIVISION

Case No. 60CV-15-3153

July 13, 2015

MARISA N. PAVAN and TERRAH D. PAVAN, Individually, and Marisa N. Pavan and Terrah D. Pavan, as parents, next friends and guardians of T.R.P., a minor child

LEIGH D. W. JACOBS and JANA S. JACOBS, Individually, and Leigh D. W. Jacobs and Jana S. Jacobs, as parents, next friends and guardians of F.D.J., a minor child

COURTNEY M. KASSEL and KELLY L. SCOTT, Individually, and Courtney M. Kassel and Kelly L. Scott, as parents, next friends and guardians of A.G.S., a minor child,
Plaintiffs

v.

NATHANIEL SMITH, MD, MPH, Director of the Arkansas Department of Health, in his official capacity, and his successors in office,
Defendant

AFFIDAVIT

Comes now Melinda Allen, and states as follows:

1. I am the Vital Records State Registrar for the Arkansas Department of Health ("ADH"), and I have held this position since December 23, 2013. I held this position at all times pertinent to this affidavit. I have

personal knowledge regarding the facts stated herein and I am competent to testify.

2. In my capacity as the Vital Records State Registrar, my job duties include supervising the issuance and maintenance of vital records, including birth certificates, by the ADH Division of Vital Records.

3. ADH is an agency within the executive branch, and it lacks the legal authority to interpret legislation contrary to the plain language of its operative statutes. In addition, ADH regulations must be adopted and amended by the State Board of Health, and ADH lacks the authority to interpret State Board of Health regulations contrary to their plain language. ADH's performance of its ministerial duty to issue and amend birth certificates in accordance with Arkansas statutes and regulations governing birth certificates is not discretionary. Any rule changes must be adopted by the State Board of Health, which ADH does not control. Any statutory amendments must be adopted by the Arkansas General Assembly, which ADH likewise does not control.

4. If an Arkansas hospital where a woman gives birth to a child submits documentation to ADH reflecting both the woman and her spouse or another person as parents of the child, ADH issues an original birth certificate reflecting both the woman and her spouse or other indicated person as parents of the child. If an Arkansas hospital where a woman gives birth to a child submits documentation to ADH reflecting only the woman as a parent of the child, but not the woman's spouse or any other person, ADH issues an original birth certificate reflecting only the woman as a parent of the child. ADH does not independently investigate

the vital information submitted by a hospital when a woman gives birth to a child in Arkansas. ADH processes all original birth certificates of children born in Arkansas hospitals based upon information submitted by the hospitals without regard to the sexual orientation, gender, or marital status of the woman giving birth to the child, and without regard to the sexual orientation, gender, or marital status of any other parent of the child.

5. After ADH issues an original birth certificate based upon information submitted by a hospital, the hospital may amend the original birth certificate within one year if the hospital determines that there is an error or omission in the vital information originally submitted by the hospital. Aside from amendments by hospitals within one year, ADH's authority to issue amended birth certificates is governed by Ark. Code Ann. § 20-18-406.

6. ADH amends birth certificates to add a parent if presented with a court order determining parentage or otherwise granting parental rights to an intended parent, or approving adoption by an intended parent, or otherwise instructing ADH to amend a birth certificate to add an intended parent. ADH processes such amendments without regard to the sexual orientation, gender, marital status, or any other characteristic of any parent or intended parent of a child.

7. The electronic birth certificate information transmitted by UAMS to ADH listed only Terrah Pavan as a parent of T.R.P. Accordingly, ADH issued an original birth certificate for T.R.P. reflecting Terrah Pavan as a parent of T.R.P. UAMS has not contacted ADH to request an amendment of T.R.P.'s original

birth certificate due to a clerical error or omission. If presented with a court order determining parentage or otherwise granting parental rights to Marisa Pavan, or approving adoption by Marisa Pavan, or otherwise instructing ADH to amend T.R.P.'s birth certificate to add Marisa Pavan as a parent, ADH will amend T.R.P.'s birth certificate to add Marisa Pavan as a parent.

8. The electronic birth certificate information transmitted by Baptist Medical Center to ADH listed only Leigh Jacobs as a parent of F.D.J. Accordingly, ADH issued an original birth certificate for F.D.J. reflecting Leigh Jacobs as a parent of F.D.J. Baptist Medical Center has not contacted ADH to request an amendment of F.D.J.'s original birth certificate due to a clerical error or omission. If presented with a court order determining parentage or otherwise granting parental rights to Jana Jacobs, or approving adoption by Jana Jacobs, or otherwise instructing ADH to amend F.D.J.'s birth certificate to add Jana Jacobs as a parent, ADH will amend F.D.J.'s birth certificate to add Jana Jacobs as a parent.

9. The electronic birth certificate information transmitted by Saline Memorial Hospital to ADH listed only Courtney Kassel as a parent of A.G.S. Accordingly, ADH issued an original birth certificate for A.G.S. reflecting Courtney Kassel as a parent of A.G.S. Saline Memorial Hospital has not contacted ADH to request an amendment of A.G.S.'s original birth certificate due to a clerical error or omission. If presented with a court order determining parentage or otherwise granting parental rights to Kelly Scott, or approving adoption by Kelly Scott, or otherwise instructing ADH to amend A.G.S.'s birth certificate to add Kelly Scott as a parent,

ADH will amend A.G.S.'s birth certificate to add Kelly Scott as a parent.

10. The overarching purpose of the vital records system is to ensure that vital records, including birth certificates as well as death certificates and marriage certificates, are accurate regarding the vital events that they reflect. The accuracy of the records allows ADH to compile, maintain, and analyze vital statistics. ADH has a legitimate interest in maintaining reliable and comprehensive statistics of all vital events for purposes of public health research and identification of public health trends.

11. Identification of biological parents through birth records is critical to ADH's identification of public health trends, and it can be critical to an individual's identification of personal health issues and genetic conditions. Even in the case of surrogacy where the biological mother is never intended to be the legal parent of a child, the statutes provide that an initial birth certificate is issued reflecting the biological mother as a parent, and then an amended birth certificate is issued reflecting the intended parent(s) as legal parent(s). The original birth certificate is sealed, but maintained by ADH. In cases of adoption, ADH also maintains sealed copies of original birth certificates reflecting biological parentage. This is important because a child may need to access information about biological parentage for health-related reasons. The State has a legitimate interest in maintaining such information (even if under seal and releasable only pursuant to a court order) in order to protect the future health of the child.

FURTHER AFFIANT SAYETH NOT.

I swear, under penalty of perjury, that the foregoing statements are true.

/s/ Melinda Allen
MELINDA ALLEN

County of Pulaski)
)
State of Arkansas)

Subscribed and sworn to before me this 6th day of Aug., 2015.

NOTARY PUBLIC

/s/

My commission expires:

4-11-2021.

SEAL

CORD
MD
BEFS.

No. 16-992

Supreme Court, U.S.
FILED
APR 14 2017
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MARISA N. PAVAN, et al.,

Petitioners,

v.

NATHANIEL SMITH, M.D., MPH,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arkansas

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Arkansas Attorney General

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QUESTION PRESENTED

Petitioners are two female married couples who conceived children through artificial insemination. Both couples have received valid birth certificates listing their respective children's biological mother and her spouse. They filed this action seeking to invalidate a state statutory scheme that generally provides for listing a birth mother's husband on a marital child's birth certificate (via a presumption of biological parentage) but does not contain a similar provision for listing a mother's same-sex spouse. As Respondent repeatedly pointed out below, Petitioners challenged the wrong provision of Arkansas law. The challenged provisions would not determine whether a birth mother's spouse was entitled to parental rights – and inclusion on a birth certificate – if Petitioners were opposite-sex couples that conceived using artificial insemination. Instead, the birth mother's opposite-sex spouse's parental rights would be governed by Arkansas's artificial insemination statute. But Petitioners have not sought relief under that statute. On the record presented in this case, the question presented is:

Whether the Fourteenth Amendment requires a State to include a biological mother's spouse – who definitively lacks any biological relationship to the child – on the child's birth certificate.

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OPINIONS BELOW

The opinion of the Arkansas Supreme Court (App., *infra*, App. 1a-25a) is reported at 2016 Ark. 437, ___ S.W.3d ___. The opinion and order of the Circuit Court of Pulaski County, Arkansas (App., *infra*, App. 48a-72a) are not reported.

JURISDICTION

The judgment of the Arkansas Supreme Court was entered on December 8, 2016. The petition for a writ of certiorari was filed on February 13, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

Petitioners are two female married couples who conceived children through artificial insemination. They ask this Court to review an Arkansas Supreme Court decision holding that a state law that generally requires a birth mother's husband – but not a same-sex spouse – be listed on a birth certificate is constitutional. Petitioners seek review despite the fact that Respondent has already issued valid birth certificates listing each child's biological mother and her spouse. They also seek review even though Respondent has conceded that another (unchallenged) provision of Arkansas law – providing that a child born to a married woman by means of artificial insemination is deemed

the legitimate natural child of the woman and her husband – would fail rational basis review unless it is read to apply equally to a birth mother's same-sex spouse.

1.a. Arkansas law requires that every child born in the state receive a birth certificate. Ark. Code Ann. 20-18-401(a). That certificate is issued by the Arkansas Department of Health (ADH) based on information supplied by the hospital where the child was born. *See* Pet. App. 86a; *see also* Ark. Code Ann. 20-18-401(a). "ADH does not independently investigate the vital information submitted by a hospital when a woman gives birth." Pet. App. 86a-87a. Instead, ADH prepares a certificate "based upon information submitted by the hospitals without regard to the sexual orientation, gender, or marital status of the woman giving birth to the child, and without regard to the sexual orientation, gender, or marital status of any other parent of the child." Pet. App. 87a. Additionally, "[a]fter ADH issues an original birth certificate based upon information submitted by a hospital, the hospital may amend the original birth certificate within one year if the hospital determines that there is an error or omission in the vital information originally submitted." *Id.*

Arkansas birth certificates list a child's name, the child's time and place of birth, and the child's parent or parents. *See* Ark. Code Ann. 20-18-401(a)-(c); App. 87a. Unless otherwise required, in Arkansas, a child's "mother is deemed to be the woman who gives birth to the child." Ark. Code Ann. 20-18-401(e). Where "the mother was not married at the time of either conception or birth or between conception and birth, the name

of the father" will not be included on a birth certificate "without an affidavit of paternity signed by the mother and the person to be named as the father." Ark. Code Ann. 20-18-401(f)(2). By contrast – since in the overwhelming majority of cases, the mother's husband is a marital child's biological father – Arkansas Code Section 20-18-401(f) presumes that "[i]f the mother was married at the time of either conception or birth," the mother's husband is "the father of the child." Ark. Code Ann. 20-18-401(f)(1). That presumption does not apply where a court order or other statute dictates a different result. *See* Ark. Code Ann. 20-18-401(f)(1)(A)-(B). Thus, where a court determines that someone else is a child's father or, alternatively, the mother, husband, and putative father attest that the putative father is a child's biological father, that putative biological father must be listed on a child's birth certificate. *See id.*

Like many other states, Arkansas also has more specific provisions that govern paternity determinations when children are conceived using assisted reproduction. *See* Ark. Code Ann. 9-10-201 (governing artificial insemination and surrogacy). Most relevant here, Arkansas Code Section 9-10-201(a) provides that, "[a]ny child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman's husband if the husband consents in writing to the artificial insemination." Ark. Code Ann. 9-10-201(a). As a result, where a mother's husband agrees to the use of anonymous donor sperm for artificial insemination,

Arkansas law deems the husband the child's natural father (even though he is definitively not the biological father) and he will be included on the child's birth certificate. *See id.*; *Brown v. Brown*, 125 S.W.3d 840, 841 (Ark. Ct. App. 2003). That provision is a narrow exception to Arkansas's generally applicable, biology-based paternity rules.

In addition to those provisions, Arkansas law also establishes procedures for amending and issuing new birth certificates. For instance, ADH will issue a new birth certificate where a child has been adopted, where a court has made a paternity determination different than that reflected on the original birth certificate, where a child's parents subsequently marry, or where "both parents have acknowledged paternity of the [child] and request that the surname be changed from that shown on the original certificate." Ark. Code Ann. 20-18-406(a); *see* Ark. Admin. Code 007.12.1-5.2 (child is legitimated and ADH will issue a new birth certificate where biological parents subsequently marry and attest to paternity). When ADH issues a new birth certificate, the original is sealed. *See* Ark. Code Ann. 20-18-406(b). As above, in issuing new certificates, where an adoption or other change warranting an amendment has occurred, "ADH processes such amendments without regard to the sexual orientation, gender, marital status, or any other characteristic of any parent or intended parent of a child." Pet. App. 87a.

b. Arkansas's vital records system is designed to ensure that the state's records are as accurate as practicable. *See* Pet. App. 86a-87a (explaining that ADH

relies on the information provided by a hospital and "does not independently investigate" information); *id.* at 87a-88a (ADH relies on electronic birth certificate information transmitted by the hospital); *id.* at 89a ("The overarching purpose of the vital records system is to ensure that vital records, including birth certificates as well as death certificates and marriage certificates, are accurate regarding the vital events that they reflect."). Accuracy is "critical" because Arkansas uses birth records identifying a child's biological parents "to compile, maintain, and analyze vital statistics" and conduct "public health research and identif[y] public health trends." *Id.* at 89a.

Accuracy is also in the child's best interest "because a child may need to access information about biological parentage for health-related reasons." Pet. App. 89a; *id.* ("The State has a legitimate interest in maintaining such information (even if under seal and releasable only pursuant to a court order) in order to protect the future health of the child."). That is why "[e]ven in the case of surrogacy where the biological mother is never intended to be the legal parent of a child, [Arkansas's] statutes provide that an initial birth certificate is issued reflecting the biological mother as a parent, and then an amended birth certificate is issued reflecting the intended parent(s) as legal parent(s)." *Id.*; *see also id.* (original birth certificates in cases of adoption are maintained under seal for the same reason).

2. After Petitioners' children were born using artificial insemination, both couples completed applications

to receive birth certificates that included both the child's biological mother and her spouse. *See* Pet. 7-8. Only the names of the biological mothers were transmitted to ADH by the hospitals where Petitioners' respective children were born, and ADH issued birth certificates reflecting the information that it received. *See* Pet. App. 87a-88a.

3.a. Petitioners thereafter filed a complaint in Pulaski County, Arkansas Circuit Court "seeking a declaration that the refusal to issue birth certificates with the names of both spouses . . . violated their constitutional rights to equal protection and due process" and "an order requiring [Respondent] to issue corrected birth certificates naming both spouses." Pet. App. 3a.[1] Petitioners also sought a declaration that Sections 20-18-401 and 20-18-406 were unconstitutional as written. *See* Pet. App. 53a ("The plaintiffs seek declaratory judgment alleging that two statutes [Sections 20-18-401 and 20-18-406] addressing birth certificates are unconstitutional in whole or part[.]"). They claimed those provisions – and in particular Section 20-18-401(f)'s general presumption that a child born to a married mother is the child of the mother's husband – must be interpreted to apply equally to a mother's female spouse. *See, e.g.*, Pet. 8; *id.* at 20-24; *id.* at 27-28. Petitioners did not mention, cite, or otherwise allude to Section 9-10-201(a)'s artificial insemination paternity provisions. *See* Pls.' Compl. for Decl. and Inj.

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[1] Petitioners were joined by another same-sex female couple that was not married at the time of their child's birth. *See* Pet. 13 n.3.

Relief, Pulaski Cty., Ark. Cir. Ct., No. 60CV-15-3135 (July 13, 2015).

Petitioners and Respondent filed cross-motions for summary judgment. *See* Pet. App. 49a. In his argument to the state circuit court, Respondent noted that Petitioners had apparently sought to invalidate the wrong provisions of the Arkansas Code since they had conceived children using artificial insemination. Respondent explained that Section 9-10-201 – and not Sections 20-18-401 and 20-18-406 – govern paternity (and thereby who is listed on a birth certificate) of a child born using artificial insemination. *See* Tr. of Proceedings, Pulaski Cty., Ark. Cir. Ct., No. 60CV-15-3153, pp. 38-39 (Nov. 23, 2015). Indeed, Respondent suggested that Section 9-10-201 "should have been where we started and ended in this case." *Id.* at p. 38.

Consistent with Petitioners' complaint, the state circuit court declined to address Section 9-10-201. *See* Pet. App. 48a-66a. Instead, the state circuit court focused entirely on – and struck down large parts of – Sections 20-18-401 and 20-18-406. *See id.* The state circuit court also ordered Respondent "to immediately issue amended certificates of birth to [Petitioners] . . . evidencing both spouses as the parents of their respective minor children." *Id.* at 48a. Respondent complied with that order, and Petitioners' children have received valid birth certificates listing both spouses as parents. *See* Pet. 10 n.2.

b. Respondent appealed the state circuit court's decision striking down whole portions of Sections

20-18-401 and 20-18-406 to the Arkansas Supreme Court. In both "his brief[ing] and during oral argument" before the Arkansas Supreme Court, Respondent echoed what he had said before the state circuit court and argued that Petitioners had brought an action to invalidate the wrong provisions of Arkansas Code. Pet. App. 22a; *see also* Res. Ark. S. Ct. Br. Arg. 28 ("Appellees challenged the wrong statute and, accordingly, the circuit court focused on the wrong statute."); Res. Ark. S. Ct. Reply Br. Arg. 13-15 (similar). Respondent explained that because Petitioners had used artificial insemination, if they were an opposite-sex couple, they would be subject to Section 9-10-201(a) and, pursuant to that provision, the mother's husband would be deemed the child's natural parent and listed on the birth certificate. *See* Pet. App. 22a; *id.* at 82a-83a; Res. Ark. S. Ct. Br. Arg. 28-29; Res. Ark. S. Ct. Reply Br. Arg. 13-15.

Moreover, during the Arkansas Supreme Court proceedings, Respondent expressly conceded that Section 9-10-201(a)'s failure to incorporate same-sex spouses would "fail[] equal protection under the plain old rational basis standard" and, as a result, "the remedy should be to have the Court either read or revise the word husband in [Section 9-10-201(a)] to mean spouse."[2] Pet. App. 82a-83a; *see also* Res. Ark. S. Ct. Br. Arg. 29; Res. Ark. S. Ct. Reply Br. Arg. 14. Under that

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[2] Petitioners mistakenly claim (Pet. 9-10) that Respondent raised this argument for the first time during oral argument before the Arkansas Supreme Court. *See* Res. Ark. S. Ct. Br. Arg. 29; Res. Ark. S. Ct. Reply Br. Arg. 14.

approach, a birth mother's spouse "would be entitled to be placed on the birth certificate initially when they were at the hospital and through the hospital's submission to [ADH]." Pet. App. 83a; *see also* Res. Ark. S. Ct. Reply Br. Arg. 14 ("[T]he State interprets section 9-10-201(a) to authorize and control birth certificates of children born through donor insemination. Absent further legislative action, the State would issue birth certificates for children born through donor insemination reflecting both the birth-mother and her spouse (including a same-sex spouse) if the Court requires, as a matter of constitutional law, a gender-neutral reading of section 9-10-201(a).").[3]

Because the state circuit court had failed to address Section 9-10-201(a), the Arkansas Supreme Court declined to address Section 9-10-201(a) or whether Petitioners might be entitled to relief under that provision. *See* Pet. App. 22a-23a (declining to address Respondent's argument because "the circuit court did not rule on the constitutionality of [Section 9-10-201(a)]"); *id.* (citing Arkansas procedural rule requiring party to obtain a ruling from state circuit court). Instead, the Arkansas Supreme Court only addressed Petitioners' claim that Sections 20-18-401 and 20-18-406 violate due process and equal protection.

In conducting its review, the Arkansas Supreme Court rejected Petitioners' argument that *Obergefell v.*

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[3] Respondent also suggested that the Arkansas General Assembly could modify that provision. Res. Ark. S. Ct. Br. Arg. 30. During its most recent session, the Arkansas General Assembly did not modify the language of that provision.

Hodges, 135 S. Ct. 2584 (2015), mandates that a mother's same-sex spouse be included on a birth certificate. *See* Pet. App. 11a-20a. As Respondent had argued, the Arkansas Supreme Court explained that *Obergefell* did not concern birth certificates, but a same-sex couple's right to marry.[4] *See id.* at 11a-12a. Indeed, *Obergefell* "mention[s] birth certificates only once" and that "single mention . . . [is] related only to its observation that states confer[] benefits on married couples, which in part demonstrate[s] that 'the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.'" Pet. App. 12a (quoting 135 S. Ct. at 2599). As a result, the court concluded that *Obergefell* did not, on its own, render Sections 20-18-401 and 20-18-406 unconstitutional. *See id.* at 13a.

The Arkansas Supreme Court further concluded that Sections 20-18-401 and 20-18-406 do not run afoul of equal protection principles because a "birth certificate evidences biological relationships" and Arkansas's statutory scheme is designed to ensure – with very narrow exceptions – that an original birth certificate reflects a child's biological parentage. Pet. App. 20a; *see*

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[4] Petitioners erroneously claim that "[Respondent] conceded that, under *Obergefell*, Arkansas's law that when a married couple uses donor insemination to have a child, they are both legal parents, must be applied equally to same-sex spouses." Pet. 10. Respondent made *no* such concession. Rather, Respondent conceded that treating same- and opposite-sex couples differently under the artificial insemination statute would "fail[] equal protection under the *plain old rational basis* standard." Pet. App. 82a (emphasis added).

also, e.g., id. (noting that to ensure that result, Arkansas "statutes penalize anyone who knowingly makes a false statement in a vital record"). Consistent with that goal, the Arkansas Supreme Court reasoned that "[i]t does not violate equal protection to acknowledge basic biological truths" that "the female spouse of a biological mother . . . does not have the same biological nexus to the child that the biological mother or the biological father has." Pet. App. 20a-21a. Indeed, quoting *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001), the Arkansas Supreme Court explained that, "[t]he difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender." Pet. App. 21a (quoting 533 U.S. at 73).

The Arkansas Supreme Court likewise rejected Petitioners' due process argument because Sections 20-18-401 and 20-18-406 do not concern the validity of Petitioners' marriages or parental rights. *See* Pet. App. 20a (Petitioners improperly "conflated distinct categories of marriage, parental rights, and vital records"). Rather, the Arkansas Supreme Court explained that Sections 20-18-401 and 20-18-406 concern the State's interest in maintaining accurate vital records and are focused "on the relationship of the biological mother and the biological father to the child, not on the marital relationship[.]" Pet. App. 14a.

Moreover, while Petitioners argued that "the failure to include both same-sex spouses on birth certificates or amended birth certificates may adversely

affect their legal status regarding the minor children," they failed to provide any "evidence, or even statutory authority, to support their assertion that any of these issues are answered by who is listed as the mother and the father on a birth certificate." Pet. App. 19a; *see also id.* ("In its ruling . . . the circuit court stated that its order 'does not legally resolve any of these potential issues.' "). Consequently, Petitioners were left merely arguing that due process required the inclusion of the mother's female spouse on the birth certificate. *See* Pet. App. 20a. But "[o]n the record presented," the Arkansas Supreme Court held that it was impossible to conclude "that naming the nonbiological spouse on the birth certificate of the child is an interest of the person so fundamental that the State must accord the interest its respect under either [Section 20-18-401 or Section 20-18-406]." *Id.* at 20a.

REASONS FOR DENYING THE PETITION

Petitioners sought to enjoin two general birth certificate provisions that – even if Petitioners were opposite-sex couples – would *not* determine the birth mother's spouse's parental rights. Instead, as Respondent has *continuously* pointed out, just like opposite-sex couples who conceive children using artificial insemination, the paternity of Petitioners' children (and Petitioners' inclusion on their respective children's birth certificates) is governed by Arkansas's artificial insemination statute. Yet rather than seek relief under that provision, Petitioners ask this Court

to review an Arkansas Supreme Court decision correctly rejecting their claims challenging a statute that would not govern similarly situated opposite-sex couples. Petitioners also ask this Court to conduct that review despite the fact that they long ago received valid birth certificates listing their respective children's biological mother and her spouse. Review is not warranted.

I. The Arkansas Supreme Court's decision is consistent with equal protection and due process.

Petitioners' principal argument for review is that the Arkansas Supreme Court's decision conflicts with *Obergefell v. Hodges*. But despite Petitioners' best efforts to transform *Obergefell* into a case about birth certificates and parental rights, that case neither "expressly or impliedly" addressed those issues. Pet. App. 11a. Instead, *Obergefell* established "that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may . . . exercise the fundamental right to marry." 135 S. Ct. at 2604-05.

1. The Arkansas Supreme Court correctly concluded that *Obergefell*'s holding neither establishes nor implies that a biological parent's same (or opposite) sex spouse enjoys a constitutionally protected due process right to be included on a child's birth certificate. *Obergefell* mentions "birth and death certificates"

only once and even then only among a lengthy list of "aspects of marital status" that various States chose to bestow on married couples. 135 S. Ct. at 2601. But far from bestowing a due process right to be included on a marital child's birth certificate, that language merely reflects this Court's recognition that "throughout our history" States have "made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities." *Id.* Indeed, rather than establishing a list of preordained rights, benefits, and responsibilities, *Obergefell* candidly acknowledged that, "the States are in general free to vary the benefits they confer on all married couples." *Id.* Petitioners do not acknowledge that language.

Instead, Petitioners simply assert that because *Obergefell* held that same-sex couples have a due process right to marry, any children born into that marriage must be considered the children of both the biological mother and her spouse. Yet Petitioners do not cite any authority for that proposition. Nor does any such authority exist. To the contrary, this Court has never held that a spouse – who has *no biological relationship* to a child – has an automatic due process right to a parental relationship with that child. Indeed, while biological parents have a well-recognized due process right to direct the care, custody, and control of their children, an individual who is not a biological parent has no such interest. *See Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *Mullins v. Oregon*, 57 F.3d 789, 794 (9th Cir. 1995); *see also Miller v. California*,

355 F.3d 1172 (9th Cir. 2004). That is true whether a birth mother's spouse is of the same or opposite sex.[5]

Further, while this Court has acknowledged that "biological relationships are not exclusive [of the] determination of the existence of a family," other forms of parentage – be it adoption or common law theories of *in loco parentis* – turn on whether that relationship is in the best interest of the child, not on a prospective parent's liberty interest. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843 (1977). Indeed, "the usual understanding of 'family' implies biological relationships, and most" of this Court's due process "decisions treating the relation between parent and child have stressed this element." *Id.* Thus, contrary to Petitioners' claim, marriage to a child's biological parent does not automatically confer a protected liberty interest in a parental relationship on the biological parent's same- or opposite-sex spouse.

And consistent with that understanding, courts across the country have also long recognized that parental rights flow from biology, not marriage. *See E.E. v. O.M.G.R.*, 20 A.3d 1171, 1174-75 (N.J. Super. Ct. Ch. Div. 2011); *Mintz v. Zoerning*, 198 P.3d 861, 863 (N.M.

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[5] Likewise, a child has no constitutionally protected interest in being adopted, or otherwise cared for, by someone who is not the child's biological parent, including the spouse of the child's biological parent. *See, e.g.*, *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 811 (11th Cir. 2004) ("no fundamental right to adopt or to be adopted"); *In re Adoption of T.K.J.*, 931 P.2d 488, 494-95 (Colo. App. 1996) (children lack liberty interest in care from potential adopting parent).

Ct. App. 2008) ("The parent and child relationship may be established between a child and the natural father . . . and the relationship extends to every child and parent, regardless of the marital status of the parents."); *In re Audrey S.*, 182 S.W.3d 838, 860 n.22 (Tenn. Ct. App. 2005) (biological parent's rights "exist notwithstanding the marital status of the child's biological parents" (citing *Lehr v. Robertson*, 463 U.S. 248, 262 (1983), and other cases)); *In Interest of R.C.*, 775 P.2d 27, 29 (Colo. 1989) ("The biological father is normally presumed to be the legal father of a child.").

2. As the Arkansas Supreme Court correctly concluded, Petitioners likewise fail to provide any basis for concluding that Sections 20-18-401 and 20-18-406 violate equal protection. Those sections do not "draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective." *Lehr*, 463 U.S. at 265; *see also Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (Equal Protection Clause "simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike"). Rather, Sections 20-18-401 and 20-18-406 treat biological (or natural) and adoptive parents, who have legally recognized parental rights, differently than persons who do not have such rights. Those distinctions also serve important – if not compelling – public health objectives.

Section 20-18-401 generally governs the issuance of original birth certificates, and it distinguishes between biological and non-biological parents. For example, Section 20-18-401(e) provides that in issuing an

original certificate, a child's "mother is deemed to be the woman who gives birth to the child, unless otherwise provided by state law or determined by a court of competent jurisdiction prior to the filing of the birth certificate." And to ensure biological accuracy, that presumption applies "[e]ven in the case of surrogacy where the biological mother is never intended to be the legal parent of a child" with an initial certificate reflecting the biological mother and "then an amended birth certificate [being] issued reflecting the intended parent(s) as legal parent(s)." Pet. App. 89a. Here, Petitioners' children received certificates listing their biological mother.

Consistent with the goal of ensuring biological accuracy, Section 20-18-401(f) likewise requires that a child's biological father generally be included on a birth certificate. Section 20-18-401(f)(2), for instance, provides that when "the mother was not married at the time of either conception or birth or between conception and birth," a father's name is to be included where the biological mother and the father execute affidavits attesting to paternity. And reflecting the fact that in the overwhelming majority of cases, the mother's husband is a marital child's biological father, Section 20-18-401(f)(1) presumes that when "the mother was married at the time of either conception or birth," the child is her husband's child and generally requires that his name be listed "on the certificate as the father of the child." But that presumption (and the requirement that he be listed on the birth certificate) does not apply where "[p]aternity has been determined otherwise by

a court of competent jurisdiction" or the mother, husband, and putative biological father attest that the husband is not the father and that the putative father is the child's father. Ark. Code Ann. 20-18-401(f)(1). Instead, in such a case, the biological father will be listed on the child's birth certificate. *See id.* Moreover, as discussed below, another statute (that Petitioners opted not to challenge) controls paternity determinations when a child is conceived using artificial insemination. *See infra* at p. 23.

Similarly, Section 20-18-406, which governs the issuance of new birth certificates, distinguishes between biological (and adopted) parents and others. Specifically, ADH will issue a new birth certificate where: 1) a child has been adopted; 2) a court has made a paternity determination different than that reflected on a child's original birth certificate; 3) a child's biological parents subsequently marry; or 4) "both parents have acknowledged paternity of the [child] and request that the surname be changed from that shown on the original certificate." Ark. Code Ann. 20-18-406(a); *see* Ark. Admin. Code 007.12.1-5.2 (child is legitimated and ADH will issue a new birth certificate where biological parents subsequently marry and attest to paternity).

Neither Section 20-18-401 nor Section 20-18-406 (the only provisions that Petitioners opted to challenge) discriminate on the basis of sexual orientation. Instead, as noted above, they distinguish between individuals based on whether the individual is biologically related to (or has adopted) a child. Indeed, under

the challenged provisions, both opposite- and same-sex spouses who have no biological relation to a child are not entitled to parental rights, or inclusion on a birth certificate, unless the spouse adopts the child or another provision requires a contrary result.

Moreover, while Petitioners focus on Section 20-18-401's presumption that a mother's husband is a marital child's biological father and argue that provision must be applied equally to a mother's female spouse, they ignore the basic fact that – unlike a husband – a mother's female spouse will *never* be a marital child's biological parent. *See Paczkowski v. Paczkowski*, 128 A.D.3d 968, 969 (N.Y. App. Div. 2015) (same-sex spouse of biological parent lacked standing to seek joint custody of child because she was "neither an adoptive nor a biological parent[,]" "the presumption of legitimacy . . . is one of a biological relationship, not of legal status[,]" and "as the nongestational spouse in a same-sex marriage, there is no possibility that she is the child's biological parent."); *Q.M. v. B.C.*, 46 Misc.3d 594, 599-600 (N.Y. Fam. Ct. 2014) ("[T]he marriage equality Act does not require the court to ignore the obvious biological differences between husbands and wives" and "while the [state law] . . . requires same-sex married couples to be treated the same as all other married couples, it does not preclude differentiation based on essential biology."). Thus, while Petitioners argue that the Arkansas Supreme Court was required to disregard "even our most basic biological differences," as this Court has previously acknowledged, that approach "risks making the guarantee of equal

protection superficial, and so disserving it." *Tuan*, 533 U.S. at 73.

Further – far from being irrelevant or arbitrary – distinguishing between biological and non-biological parents fulfills numerous, and even compelling, governmental interests. Below, undisputed evidence established that Arkansas's vital records system is designed to ensure that the state's records are as accurate as practicable because biological birth records are used "to compile, maintain, and analyze vital statistics," conduct "public health research and identif[y] public health trends," and ensure that if a child "need[s] to access information about biological parentage for health-related reasons," that information is available. Pet. App. 89a; *see also id.* ("The overarching purpose of the vital records system is to ensure that vital records, including birth certificates as well as death certificates and marriage certificates, are accurate regarding the vital events that they reflect."). Indeed, that is why, as noted above, "[e]ven in the case of surrogacy where the biological mother is never intended to be the legal parent of a child, [Arkansas's] statutes provide that an initial birth certificate is issued reflecting the biological mother as a parent, and then an amended birth certificate is issued reflecting the intended parent(s) as legal parent(s)." *Id.*

And consistent with those principles, numerous other state courts have recognized that States have a legitimate interest in maintaining such information. *See, e.g.*, *Matter of Rebecca*, 158 Misc.2d 644 (N.Y. Sur. Ct. 1993) (authorizing disclosure of biological mother's

and grandmother's identity to adoptee to establish that she was full-blooded Oneida Indian under Indian Child Welfare Act); *Matter of Hanson*, 470 N.W.2d 669 (Mich. Ct. App. 1991) (authorizing release of sealed adoption records so that adoptee could learn whether she was born prematurely and might have received certain drugs that could have ongoing complications); *Kirsch v. Parker*, 383 So.2d 384 (La. 1980) (allowing adoptee to inspect records in part because records might help adoptee with treatment of medical ailments); *Matter of Chattman (Bennett)*, 57 A.D.2d 618 (N.Y. App. Div. 1977) (authorizing release of adoptee's and her parent's medical records to investigate the possibility of genetic or hereditary conditions).

In response, Petitioners merely suggest that Sections 20-18-401 and 20-18-406 do not perfectly further Arkansas's asserted interest. *See* Pet. 21-23. Yet where, as here, a law does not discriminate based on a suspect classification or concern a fundamental right, it "must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (internal citation omitted). Thus, "[e]ven if the classification involved here is to some extent both underinclusive and overinclusive, and hence . . . imperfect," it is constitutional so long as it is rationally related to the purported government interest. *Vance v. Bradley*, 440 U.S. 93, 108 (1979); *see also Sullivan v. Stroop*, 496 U.S. 478, 485 (1990); *Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970). Arkansas's birth certificate provisions easily

meet that standard because even if Section 20-18-401(f) might authorize Respondent to issue a birth certificate listing a husband who is not a child's biological father, that provision reflects typicality and the statutory scheme provides a method for correcting errors.

3. Rather than challenge general provisions that are designed to ensure biological accuracy, Petitioners should have proceeded under Arkansas's artificial insemination statute. That statute represents a limited and well-defined departure from Arkansas's general, biology-based parental regime. Indeed, in the discrete circumstance where an opposite-sex couple conceives using artificial insemination, Section 9-10-201(a), deems a child "born to a married woman . . . the legitimate natural child of the woman and the woman's husband." Respondent has repeatedly conceded – consistent with decisions interpreting similar statutes (*see infra* at B) – that to survive ordinary rational basis review, that provision must be interpreted to apply equally to same- and opposite-sex couples who conceive using artificial insemination. Yet Petitioners have not challenged that provision.

II. Petitioners fail to allege any split in authority that would warrant this Court's review.

Petitioners baldly assert that "[t]he Arkansas Supreme Court's decision conflicts directly with the unanimous conclusion of other courts that *Obergefell* prohibits the discrimination at issue here" (Pet. 25), but they do not cite a *single* state or federal decision

that is inconsistent with the decision below. Instead, Petitioners attempt to conjure conflicts between a handful of federal district court decisions holding that statutes that distinguish between same- and opposite-sex couples who use *artificial insemination* are unconstitutional. Yet as noted above – and as Respondent pointed out before the state circuit court and the Arkansas Supreme Court – Petitioners have *not* challenged Arkansas's artificial insemination statute.

Petitioners cite *Roe v. Patton*, 2015 WL 4476734, *1 (D. Utah July 22, 2015). But that case involved a challenge to Utah's assisted reproduction statute which – mirroring Section 9-10-201(a) – provided that a child born to a married woman using artificial insemination was deemed her husband's child so long as the husband consented to the use of assisted reproduction. *Id.* Consistent with Respondent's *repeated* concession here, *Roe* concluded that Utah had no "rational basis for the different treatment of male and female spouses of women who give birth through assisted reproduction involving the use of donor sperm." *Id.* at *3. Similarly, *Torres v. Seemeyer*, 2016 WL 4919978, *6-8 (W.D. Wis. Sept. 14, 2016), granted summary judgment under Wisconsin's artificial insemination statute to a class of same-sex married women who claimed that Wisconsin's artificial insemination statute was being unevenly enforced. Tellingly, in reaching that conclusion, *Torres* admonished the plaintiffs in that case for continuing to argue – as Petitioners here have – that *Obergefell* required the court to grant much broader relief "on behalf of all married female couples who gave

birth to a child after same-sex marriage was legalized in Wisconsin" after Wisconsin had conceded that the plaintiffs were entitled to equal treatment under the artificial insemination statute. *Id.* at *6; *see also id.* at *5 (noting Wisconsin's concession).

Petitioners also cite *Henderson v. Adams*, 2016 WL 3548645 (S.D. Ind. June 30, 2016). That case invalidated Indiana's general presumptive paternity statutes because those provisions provided that a child born to a married mother is presumed to be her husband's child but do not contain a similar presumption for a mother's female spouse. But Petitioners ignore the fact that Indiana's paternity statutes – unlike Arkansas's, Utah's, and Wisconsin's "more comprehensive statutory scheme[s]" – did not separately "address parentage, artificial insemination, and birth certificates." *Id.* at *12. Thus, unlike here – and in *Roe* and *Torres* – there was no argument that any Indiana provision other than the general paternity statutes ought to control and the issue was whether Indiana's general paternity statutes were unconstitutional. Moreover, to the extent *Henderson* might be construed as inconsistent with every other decision cited by the Petitioners and the decision below, review is not warranted because *Henderson* is currently being reviewed by the United States Court of Appeals for the Seventh Circuit and there is no reason to believe that court's decision will be inconsistent with every other decision.

III. Even if the question presented warranted this Court's review, this case would be an unsuitable vehicle in which to address it.

It is undisputed that Respondent long ago issued valid birth certificates to Petitioners' children listing their respective biological mother and her spouse. Therefore, Petitioners – who have not suffered an injury-in-fact – are particularly ill-suited to challenge Sections 20-18-401 and 20-18-406.

Seeking to avoid that problem, Petitioners now represent that "one of the petitioner couples is again expecting a child, and the birth mother's spouse . . . again seeks recognition of her right . . . to be listed as the child's parent on the birth certificate." Pet. 11 n.2. But that representation does not demonstrate that review is warranted here because – as Respondent has *repeatedly* conceded and courts interpreting similar statutes have recognized – if Petitioners had sought relief under Arkansas's artificial insemination statute (rather than Sections 20-18-401 and 20-18-406), to survive ordinary rational basis review, Respondent would have been required to accord Petitioners the same rights as an opposite-sex couple who had conceived using artificial insemination. Given that concession, Petitioners cannot point to any threatened future harm since, if Petitioners proceeded under the proper statute, Respondent will accord them the same rights as a similarly-situated opposite-sex couple. *Cf. Virginia*

v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 393 (1988). Thus, review is not warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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RECORD AND BRIEFS.

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No. 16-992

In the Supreme Court of the United States

MARISA N. PAVAN, ET AL., PETITIONERS

v.

NATHANIEL SMITH, M.D., MPH

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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REPLY BRIEF OF PETITIONERS

Respondent strives to draw the Court's attention away from this central fact: under the Arkansas Supreme Court's decision, when a married woman gives birth in the circumstances petitioners did, her spouse, if male, will be named on the child's original birth certificate as a parent, despite having no biological relationship to the child, but her female spouse will not. Nowhere does respondent attempt to justify that disparate treatment of married same-sex couples. Instead, respondent engages in a series of distractions, including his central argument that petitioners should have challenged a different Arkansas statute that neither mentions birth certificates nor controls their issuance.

The Court should not be misled. Under this Court's decision in *Obergefell* v. *Hodges*, same-sex couples are entitled not only to obtain marriage licenses, but also to enjoy the rights and responsibilities of mar-

riage "on the same terms and conditions as opposite-sex couples." 135 S. Ct. 2584, 2605 (2015).

With narrow exceptions not applicable here, Arkansas Code § 20-18-401 (the Birth Certificate Law), Pet. App. 76a-79a, confers on the male spouse of a married woman the right to be named as a parent on the birth certificate of any child born during the marriage, regardless of whether he is the child's genetic father. Arkansas's denial of that right to same-sex spouses subjects those couples and their children to serious and continuing harms. It deprives their children of the stability and security given to other marital children, casts doubt on the integrity and equality of their families, and exposes them to a host of tangible indignities and harms. See Family Equality Council Amicus Br. 5-10; Family Law Profs. Amicus Br. 20-21; see also Pet. 5-7, 18-20. This Court's review is warranted by the profound importance of this issue to Arkansas families and to ensure that other states do not similarly flout this Court's decision in *Obergefell*.

A. Respondent Is Denying Petitioners Equal Enjoyment Of A Marital Right Under Arkansas Law, In Violation Of *Obergefell*

This Court's decision in *Obergefell* established that the fundamental right of same-sex couples to marry entails equal access to the rights, benefits, and responsibilities conferred to married couples by state law. When a state ties a right to marriage, that aspect of marital status must be afforded equally to same- and opposite-sex couples. See Pet. 16-18.

The right of the birth-mother's spouse to be named on a birth certificate is a benefit conferred by marriage under Arkansas law.[1] The statutes require the Arkansas Department of Health (ADH) to name a birth mother's male spouse on the child's birth certificate—even where the birth mother's spouse is not a biological parent—based solely on his marriage to the mother. See Pet. 21-23. By its express terms, Arkansas Code § 20-18-401(f)(1) states that "[i]f the mother was married at the time of * * * birth the name of the husband shall be entered on the certificate as the father of the child." Pet. App. 77a. Thus, in Arkansas, inclusion on a birth certificate is part of the "constellation of benefits * * * linked to marriage." *Obergefell*, 135 S. Ct. at 2601. And yet, under the decision below, Arkansas refuses to treat same-sex couples equally in this respect.

Rather than grappling with the constitutional question actually presented by this case, respondent mischaracterizes petitioners' arguments. Contrary to respondent's assertions (Br. 14-15), petitioners are not claiming an independent due process right to be named on a marital child's birth certificate. Rather, petitioners are seeking to vindicate their right to the full "con-

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[1] While "the States are in general free to vary the benefits they confer on all married couples," *Obergefell*, 135 S. Ct. at 2601, whether a given right is, in fact, an "aspect[] of marital status," *ibid.*, that must be given to all married couples "on the same terms and conditions as opposite-sex couples," *id.* at 2605, is necessarily a question of federal law, or else same-sex couples' constitutional right to marry would be "quite simply insusceptible of enforcement by federal courts." *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Prot.*, 560 U.S 702, 726-727 (2010) (plurality opinion).

stellation of benefits" conferred on married couples under Arkansas law. *Obergefell*, 135 S. Ct. at 2600-2601. Indeed, "birth certificates" were among the rights of marriage specifically identified in *Obergefell* and were the basis of the suits brought by many of the plaintiffs whose claims this Court upheld. See *ibid.*; Pet. 19-20. By issuing birth certificates naming both spouses in opposite-sex married couples, but denying that benefit to similarly situated same-sex couples, Arkansas is flouting this Court's holding in *Obergefell*.

Respondent attempts to justify this disparate treatment by reference to the possibility of biological connections between an opposite-sex spouse and children of the marriage, but that effort fails. Respondent states that the Birth Certificate Law "generally *requires*" that the husband of a child's birth mother be named on the child's birth certificate, because "in the overwhelming majority of cases, the mother's husband is a marital child's biological father." Resp. Br. 17 (emphasis added). Respondent acknowledges, however, that a biological relationship with the child is not required for Arkansas to list the male spouse of the birth mother as the child's parent. *Id.* at 3-4. Under circumstances identical to those presented by the petitioners, where a married opposite-sex couple conceives using artificial insemination, the "husband would be deemed the child's natural parent" and "included on the child's birth certificate," "even though *he is definitively not the biological father*." *Ibid.* (emphasis added). Even assuming, as respondent asserts (Br. 17), that there is a biological relationship between the child and the birth mother's male spouse in most cases, that would not justify naming as parents male spouses who "definitively" lack a biological relationship while denying the same

right to similarly situated female spouses. It does not matter that respondent characterizes that well-established right as "a narrow exception." *Ibid.*[2] If Arkansas provides this protection for male spouses of birth mothers, it must do the same for female spouses.

Obergefell forecloses respondent's attempt to justify its disparate treatment of married same-sex couples based on biology. There, too, the states sought to defend their disparate treatment of same-sex couples on the ground that only opposite-sex couples have a capacity for biological procreation. The Court, however, rejected that as a reason to deny same-sex couples equal access to the institution of marriage and the accompanying aspects of marital status. See 135 S. Ct. at 2600-2601. Under *Obergefell*, because Arkansas gives married parents the right to be named on their children's birth certificates, including when the husband has no biological relationship to the child, the State may not invoke biology as a constitutionally sufficient reason to deny that right only to married same-sex couples.

Respondent's attempt (Br. 20) to defend the State's discriminatory treatment of same-sex couples on the basis of the State's interest in tracking a child's biological relationships is directly contravened by Arkansas's own laws. Not only do those laws often require the *exclusion* of a child's biological parent from a birth certifi-

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[2] Published guidance from the State suggests that the exception is not, in fact, so "narrow," and confirms that it applies in circumstances beyond artificial insemination. See p. 6, *infra* (discussing Department of Finance and Administration guidance); see also Pet. 22 (citing Arkansas caselaw limiting the circumstances under which an alleged biological father can seek to challenge a husband's paternity).

cate, they permit and sometimes require the *inclusion* of non-biological parents. Pet. 4-5, 21-23. According to guidance published by the State, "[w]hen a child is born to married parents, there is an *automatic* legal relationship between the child and the husband of the mother," even "if the husband knows he is not the father of her child." *Paternity*, Ark. Dep't of Fin. & Admin., http://www.dfa.arkansas.gov/offices/childSupport/custodialParty/Pages/paternity.aspx#faqs (emphasis added)). While the husband "*can* deny paternity," he may do so only "*if* the mother and biological father are in agreement." *Ibid.* (emphases added); see also Ark. Code § 20-18-401(f)(1)(B). And respondent concedes (Br. 3-4) that under Arkansas law a non-biological parent will be named on the birth certificate when a child is born to a married opposite-sex couple under circumstances identical to those of the petitioners here. The State cannot deprive same-sex couples of the equal dignity and protection of their marriages by selectively implementing a purported interest in recording a child's biological parentage only when a child is born to a married same-sex couple.

B. Petitioners Properly Challenged The Arkansas Birth Certificate Statute To Vindicate Their Right To A Birth Certificate

Respondent's claim that petitioners could have obtained the relief they sought by challenging Arkansas Code § 9-10-201(a) (the Artificial Insemination Law) has no merit. Petitioners seek original birth certificates naming both spouses as parents. The Artificial Insemination Law does not mention birth certificates nor direct the ADH to issue them. When ADH unconstitutionally denied petitioners a birth certificate naming both spouses, petitioners correctly challenged the

Birth Certificate Law that specifically governs ADH's issuance of birth certificates and was the law under which ADH was acting when it subjected them to disparate treatment.

Respondent nowhere explains how the Artificial Insemination Law could be read to govern ADH's duties with respect to issuance of original birth certificates. The Birth Certificate Law, which is part of the Vital Statistics Act, addresses the issuance of records related to "birth, death, marriage, divorce, or annulment," among other subjects. Ark. Code § 20-18-103. As with these other records, the issuance of a birth certificate is a purely administrative act. *Id.* § 20-18-401(a)-(c).[3] The Birth Certificate Law makes no reference to the Artificial Insemination Law as an alternate basis for ADH to issue birth certificates, nor does the Birth Certificate Law differentiate based on the manner in which a child born to a married couple is conceived.

The Artificial Insemination Law, by contrast, establishes the legal parentage rights of non-birth spouses to children born to the other spouse via artificial insemination. It appears in the "Paternity" chapter of the Family Law Title to the Arkansas Code, alongside other provisions detailing the rights and obligations of those deemed legal parents.[4] Respondent fails to ex-

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[3] As respondent notes, "ADH does not" even "independently investigate the vital information submitted by a hospital when a woman gives birth." Resp. Br. 2 (quoting Pet. App. 86a-87a).

[4] One provision of the Family Law does address the issuance of birth certificates, but applies only to surrogacy, which has no application here. Ark. Code § 9-10-201(c)(2). Pet. App. 75a. No similar provision exists in the Artificial Insemination Law.

plain on what authority he would issue petitioners birth certificates under the Artificial Insemination Law that would not also depend on ADH's authority under the Birth Certificate Law. In other words, respondent fails to show how even if petitioners had challenged the Artificial Insemination Law and won, that would have brought the relief they sought—issuance of birth certificates naming both spouses as parents of the marital child.

In sum, notwithstanding respondent's deflections, the constitutional question squarely presented by this case remains: whether Arkansas can enforce its Birth Certificate Law to require the issuance of birth certificates naming both the birth mother and her husband as parents, including when the husband has no biological relationship to the couple's child, while denying that right to married same-sex couples.

C. The Decision Below Warrants This Court's Review

Contrary to respondent's assertions, the ruling below conflicts with every other court to address the issue and remains a live issue of critical importance to petitioners individually and to similarly situated couples throughout Arkansas. Indeed, one of the petitioner couples is expecting another child and will be denied a birth certificate naming both spouses as parents under the Arkansas Supreme Court's decision.

1. Respondent's attempt to distinguish the unanimous decisions of other courts in similar cases (Br. 22-24) has no merit. Every court to consider this issue has held that, under *Obergefell*, states cannot require both spouses to be named on a marital child's birth certifi-

cate, but then limit that benefit to opposite-sex couples. See Pet. 25-27.

Respondent's attempt (Br. 23-24) to distinguish *Torres* v. *Seemeyer*, 207 F. Supp. 3d 905 (W.D. Wis. 2016), and *Roe* v. *Patton*, No. 2:15–cv–00253–DB, 2015 WL 4476734 (D. Utah July 22, 2015), has no merit. Both of those cases held that states must apply the same rules regarding the issuance of birth certificates to married same-sex couples that they apply to married opposite-sex couples. *Torres*, 207 F. Supp. 3d at 911-912, 914; *Patton*, 2015 WL 4476734, at *3-4. Respondent places great weight on the fact that the petitioners in those cases challenged laws about the parentage of children born through artificial insemination, but fails to note that they did so only because of variations between those states' statutory schemes and Arkansas's.

In *Torres*, the plaintiffs properly challenged a Wisconsin statute that addressed *both* the parentage of children born to married couples through donor insemination *and* the issuance of birth certificates for such children. See 207 F. Supp. 3d at 909. Plaintiffs argued that the statute must be applied equally to married same-sex couples, and the court agreed. See *id.* at 911-912, 914. Here, Arkansas's Birth Certificate Law mandates that both spouses be named as parents on a marital child's birth certificate, regardless of how the child was conceived. See Pet. App. 76a-79a. Accordingly, petitioners properly challenged respondent's refusal to apply that law equally to same-sex spouses.[5]

---

[5] Respondent erroneously suggests (Br. 23-24) that the court in *Torres* "admonished the plaintiffs in that case for continuing to argue * * * that *Obergefell* required the court to grant much

Similarly, unlike Arkansas, Utah has no general statute expressly directing the issuance of birth certificates naming marital spouses. Instead, the Utah Department of Health had a policy of naming both spouses on the birth certificate of a child born to married opposite-sex couples through artificial insemination, based on a statute providing that a husband who consents to have a child in that manner is a legal father. See *Patton*, 2015 WL 4476734, at *2 (characterizing defendant's policy of issuing birth certificates in cases of artificial insemination as being "pursuant to Utah's assisted-reproduction statutes"). Accordingly, when the Utah Department of Health refused to place a birth mother's female spouse on the child's birth certificate, she brought suit to establish that she was a legal parent under Utah's artificial insemination law and entitled to receive a birth certificate under the Department of Health's policy enforcing that statute. *Ibid.* Nothing in *Patton* suggests it would have been improper to challenge a birth certificate statute explicitly granting spousal rights if Utah had one.

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broader relief 'on behalf of all married female couples who gave birth to a child after same-sex marriage was legalized in Wisconsin' after Wisconsin had conceded that the plaintiffs were entitled to equal treatment under the artificial insemination statute." In fact, the court merely held that "because * * * the right to list the birth mother's spouse on a birth certificate works differently under Wisconsin law depending on whether a couple conceives through artificial insemination or other means," it would only address the former circumstance, since all the plaintiffs in that case had conceived through artificial insemination. 207 F. Supp. 3d at 910. Again, in contrast, Arkansas's Birth Certificate Law applies to all children born to married couples, regardless of how they are conceived.

Respondent's attempt to distinguish *Henderson* v. *Adams*, 209 F. Supp. 3d 1059 (S.D. Ind. 2016), similarly fails. *Henderson* held that because Indiana lists both opposite-sex spouses as the parents of a child born in wedlock on the child's birth certificate, it must do so for same-sex spouses as well. *Id.* at 1076. The court expressly rejected Indiana's attempted reliance on the same rationale asserted by Arkansas here—namely, an asserted state interest in the biological accuracy of birth certificates. *Id.* at 1073-1075, 1077. In Indiana, like other states, "married women" are "allow[ed] to name their husband on their child's birth certificate even when the husband is not the biological father." *Id.* at 1075-1076. Citing *Obergefell*, the court held that "this benefit—which is directly tied to marriage—must now be afforded to women married to women." *Id.* at 1076. It is irrelevant that Indiana does not have a specific statute addressing the parentage of children born through artificial insemination. As *Henderson* and every other court to consider this question has held, under *Obergefell*, where a state confers a benefit to married opposite-sex spouses, including with respect to the issuance of birth certificates, it must afford that benefit to same-sex spouses as well.

2. Petitioners' claims remain live, and warrant this Court's immediate review. Respondent repeatedly references the fact that petitioners were granted birth certificates under the trial court's now-reversed injunction, but rightly does not suggest that this moots their case. The Arkansas Supreme Court treated petitioners' claim as a facial challenge to the Birth Certificate Law; their receipt of birth certificates pursuant to the trial court's injunction did not moot the case. Pet. App. 10-11, n.2. While individual birth certificates were

granted to these couples for specific children, the Arkansas Supreme Court reversed the circuit court's opinion and expressly held that the Birth Certificate Law does not authorize ADH to issue birth certificates to same-sex couples based on their marital status. In addition, one of the petitioner couples is expecting another child, *ibid.*, and therefore continues to be immediately and tangibly affected by this case. As a consequence of the decision below, hospitals where babies are delivered will not include the name of a birth mother's same-sex spouse when communicating to ADH the information for inclusion on a birth certificate. Only review by this Court can correct the wrong that is being inflicted on Arkansas couples, including the currently expecting petitioner couple, under the Arkansas Supreme Court's ruling.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and in the scope of the Fourteenth Amendment's protections for liberty and equality.

SUMMARY OF ARGUMENT

Under Arkansas law, when a woman married to a man gives birth, the general rule is that her husband must be listed as the second parent on the child's birth certificate, even when he is not the child's biological parent. But when a woman married to another woman gives birth, her spouse may not be listed as the second parent on the child's birth certificate. The Petition for a Writ of Certiorari in this case presents the important question whether such disparate treatment is consistent with the Fourteenth Amendment.

According to the Arkansas Supreme Court, it is, notwithstanding this Court's recent decision in *Ober-*

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus*'s intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

gefell v. Hodges, 135 S. Ct. 2584 (2015). In that court's view, *Obergefell* held only that the Fourteenth Amendment requires that same-sex couples be allowed to marry; it does not require that they be treated the same as opposite-sex couples when it comes to the issuance of birth certificates for their children. This crabbed understanding of this Court's decision in *Obergefell* is plainly wrong, as the Petition explains, and review is appropriate for that reason alone. *See* Pet. 15-25. *Amicus* submits this brief to demonstrate that this understanding of the Court's decision in *Obergefell* is also at odds with the text and history of the Fourteenth Amendment, and this Court's review is warranted for that reason, as well.

Ratified 150 years ago in the wake of a bloody Civil War fought over the issue of slavery, the Fourteenth Amendment fundamentally altered our Constitution's protection of individual, personal rights, adding to our nation's charter sweeping guarantees of liberty and equality. Erasing the stain of slavery—the ultimate violation of personal liberty—from the Constitution, the Amendment's Framers affirmed that "there are some inherent and inalienable rights, pertaining to every citizen, which cannot be abolished or abridged by State constitutions or laws," including the "right to live, the right of personal security, personal liberty, and the right to acquire and enjoy property." Cong. Globe, 39th Cong., 1st Sess. 1832, 1833 (1866).

Among these personal rights that "cannot be abolished or abridged by State constitutions or laws" is the right to marry. *Id.* at 504; *see id.* (explaining that the "attributes of a freeman according to the universal understanding of the American people" include "the right of having a family, a wife, children, home"). Indeed, as this Court recognized in *Obergefell*, "mar-

riage is fundamental under the Constitution," *Obergefell*, 135 S. Ct. at 2599, because of the "abiding connection between marriage and liberty," and the fact that "[c]hoices about marriage shape an individual's destiny." *Id.*; *see Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Turner v. Safley*, 482 U.S. 78, 95 (1987).

The Fourteenth Amendment's protection of the fundamental right to marry trumps any contrary state law because it is "the supreme Law of the Land," superior in force to "any Thing in the Constitution or Laws of any State to the Contrary." U.S. Const. art. VI, cl. 2. The drafters of our Constitution were acutely aware of legal wrongs state governments committed under the Articles of Confederation, and they wrote the Constitution to impose checks on the power of governing majorities in the states. Chief among those checks was the Supremacy Clause, which makes the Constitution "the supreme Law of the Land," *id.* By including in the Constitution a sweeping declaration of constitutional supremacy, the Framers firmly rejected the notion that federal constitutional guarantees should be left to the democratic process and decided by the people of the states.

This Court should grant review and reverse the decision of the court below because its decision is fundamentally at odds with the Fourteenth Amendment's equal protection guarantee. By treating same-sex married couples differently than opposite-sex married couples, the Arkansas birth certificate laws deny same-sex married couples the "right to participate in the benefits and responsibilities of marriage to the same extent and on equal terms as opposite-sex couples." Pet. 15. In upholding these laws, the court below denied same-sex married couples the full liberty to which they are entitled under the Four-

teenth Amendment, as well as important "benefits that the States have linked to marriage," thereby "impos[ing] stigma and injury of the kind prohibited by our basic charter." *Obergefell*, 135 S. Ct. at 2601, 2602.

Arkansas argues that "[t]he purpose of the [state birth certificate] statutes is to truthfully record the nexus of the biological mother and the biological father to the child," Pet. App. 20a, but that purported purpose is belied by the fact that, in the context of opposite-sex couples, the spouse of the biological mother is, except in narrow circumstances, listed on the birth certificate even if he is *not* the biological parent of the child. Pet. 3. Indeed, Arkansas law "expressly provides that when a married couple uses donor insemination to have a child," as petitioners did here, "the child is 'deemed the legitimate natural child of . . . the woman's husband,' and the husband is the child's legal father." *Id.* at 4 (citing Ark. Code § 9-10-201(a)). To treat same-sex married couples differently "serves to disrespect and subordinate" them, *Obergefell*, 135 S. Ct. at 2604, in defiance of both the Constitution and this Court's precedents. This Court should grant review and reverse the decision of the court below.

ARGUMENT

THE COURT SHOULD GRANT REVIEW TO HOLD THAT THE DECISION BELOW VIOLATES THE FOURTEENTH AMENDMENT

A. As this Court Recognized in *Obergefell*, the Fourteenth Amendment Guarantees All Persons an Equal Right To Marry the Person of Their Choice

Drafted in 1866 and ratified in 1868, the Fourteenth Amendment "fundamentally altered our country's federal system," *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010), in order to "repair the Nation from the damage slavery had caused," *id.* at 807 (Thomas, J., concurring), and to secure for the nation the "new birth of freedom" that President Abraham Lincoln had promised at Gettysburg. Central to that task was the protection of the full range of personal, individual rights essential to liberty. To achieve these ends, the Framers of Section 1 of the Fourteenth Amendment chose sweeping language specifically intended to protect the full panoply of fundamental rights for all, providing that no State shall "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

History shows that the Framers of the Fourteenth Amendment wrote Section 1's overlapping guarantees to "forever disable" the states "from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction." Cong. Globe, 39th Cong.,

1st Sess. 2766 (1866). "The great object of the first section of th[e] amendment," Senator Jacob Howard explained, was "to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.*

The Fourteenth Amendment thus wrote into the Constitution the idea that "[e]very human being in the country, black or white, man or woman . . . has a right to be protected in life, in property, and in liberty." *Id.* at 1255. In this way, Section 1 gave to "the humblest, the poorest, the most despised . . . the same rights and the same protection before the law as it [gave] to the most powerful, the most wealthy, or the most haughty." *Id.* at 2766; *see* Jack M. Balkin, *Living Originalism* 198 (2011) (explaining that the overlapping guarantees of Section 1 "together . . . were designed to serve the structural goals of equal citizenship and equality before the law").

Erasing the stain of slavery—the ultimate violation of personal liberty—from the Constitution, the Amendment's Framers affirmed that "there are some inherent and inalienable rights, pertaining to every citizen, which cannot be abolished or abridged by State constitutions or laws," including the "right to live, the right of personal security, personal liberty, and the right to acquire and enjoy property." Cong. Globe, 39th Cong., 1st Sess. 1832, 1833 (1866). Among these personal rights is the right to marry. *Id.* at 504 (explaining that the "attributes of a freeman according to the universal understanding of the American people" include "the right of having a family, a wife, children, home"); *id.* at 343 ("[T]he poor man, whose wife may be dressed in a cheap calico, is as much entitled to have her protected by equal law as is the rich man to have his jeweled bride protected by the laws of the land[.]"); Speech of Gov. Oliver

Morton at Anderson, Madison Cty., Indiana (Sept. 22, 1866), *in Cincinnati Commercial*, Nov. 23, 1866, *reprinted in Speeches of the Campaign of 1866 in the States of Ohio, Indiana, and Kentucky* 35 (1866) ("We say that the colored man has the same right to enjoy his life and property, to have his family protected, that any other man has."). As this Court has long recognized, "marriage is fundamental under the Constitution," *Obergefell*, 135 S. Ct. at 2599, because of the "abiding connection between marriage and liberty," and the fact that "[c]hoices about marriage shape an individual's destiny." *Id.*; *see Loving*, 388 U.S. at 12; *Zablocki*, 434 U.S. at 384; *Turner*, 482 U.S. at 95.

The Fourteenth Amendment not only protects substantive fundamental rights, it also guarantees to all persons residing in the United States the equal protection of the laws, forbidding a state from enacting a law that discriminatorily denies the right to marry, or the benefits of marriage, to certain groups or classes. The Fourteenth Amendment, which prohibits a state from denying to "any person" the "equal protection of the laws," secures the same rights and same protection under the law for all men and women, of any race, whether young or old, native or foreign born, citizen or alien, gay or heterosexual. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ."); *Civil Rights Cases*, 109 U.S. 3, 24 (1883) ("The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.").

As the debates over the Fourteenth Amendment show, the original meaning of the equal protection guarantee "establishes equality before the law," Cong. Globe, 39th. Cong., 1st Sess. 2766 (1866), "abolishes all class legislation in the States[,] and does away with the injustice of subjecting one caste of persons to a code not applicable to another." *Id.* The meaning of equal protection was that the "law which operated upon one man shall operate equally upon all," *id.* at 2459 (emphasis in original), thereby "securing an equality of rights to all citizens of the United States, and of all persons within their jurisdiction," *id.* at 2502; *see Civil Rights Cases*, 109 U.S. at 24 ("[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment . . . ."); *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 256 (C.C.D. Cal. 1879) (No. 6,456) (Field, C.J.) ("[H]ostile and discriminating legislation by a state against persons of any class, sect, creed or nation, in whatever form . . . is forbidden by the fourteenth amendment . . . .").

Importantly, the Fourteenth Amendment's broad language was no accident. When the 39th Congress drafted the Fourteenth Amendment, it chose universal language specifically designed to secure equal rights for all. While the Amendment was written and ratified in the aftermath of the Civil War and the end of slavery, it protects all persons. "[S]ection 1 pointedly spoke not of race but of more general liberty and equality." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 260-61 n.* (1998). Indeed, the Reconstruction-Era Framers specifically considered and rejected proposed constitutional language that would have outlawed racial discrimination and nothing else, *see* Benjamin B. Kendrick, The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865-1867, at 46, 50, 83 (1914), pre-

ferring a universal guarantee of equality that secured equal rights to all persons. Whether the proposals were broad in scope or were narrowly drafted to prohibit racial discrimination in civil rights, the Framers of the Fourteenth Amendment consistently rejected limiting the Amendment's equality guarantee to racial discrimination. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 151 (1994) (Kennedy, J., concurring) ("Though in some initial drafts the Fourteenth Amendment was written to prohibit discrimination against 'persons because of race, color or previous condition of servitude,' the Amendment submitted for consideration and later ratified contained more comprehensive terms . . . ."). The Fourteenth Amendment's "neutral phrasing," "extending its guarantee to 'any person,'" *id.* at 152 (Kennedy, J., concurring), was intended to secure equal rights for all.

The Fourteenth Amendment's Framers crafted this broad guarantee of equality for all persons to bring the Constitution back into line with the fundamental principles of American equality, which had been betrayed and stunted by the institution of slavery. *See McDonald*, 561 U.S. at 807 (Thomas, J., concurring) ("[S]lavery, and the measures designed to protect it, were irreconcilable with the principles of equality . . . and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure."). After nearly a century in which the Constitution sanctioned racial slavery and allowed all manner of state-sponsored discrimination, the Fourteenth Amendment codified our nation's founding promise of equality through the text of the Equal Protection Clause. As the Amendment's Framers explained time and again, the guarantee of the equal protection of the laws was "essentially declared in the Declaration of Independence," Cong.

Globe, 39th Cong., 1st Sess. 2961 (1866), and was necessary to secure the promise of liberty for all persons. "How can he have and enjoy equal rights of 'life, liberty, and the pursuit of happiness' without 'equal protection of the laws?' This is so self-evident and just that no man . . . can fail to see and appreciate it." *Id.* at 2539.

In short, the Fourteenth Amendment established as constitutional mandates the protection of substantive fundamental rights, including the right to marry, and equality under the law, forbidding the people of a state from denying any group of persons their fundamental rights. Under the Amendment's plain text and original meaning, this sweeping, universal guarantee of liberty and equality applies to all who wish to exercise the right to marry, one of the "attributes of a freeman according to the universal understanding of the American people[.]" Cong. Globe, 39th Cong., 1st Sess. 504 (1866). This guarantee necessarily trumps any state law to the contrary, as the next Section discusses.

B. The Fourteenth Amendment and the Supremacy Clause Together Require That the Equal Protection Guarantee Must Be Enforced Against Contrary State Law

The Fourteenth Amendment's guarantees of substantive fundamental rights, including the right to marry, and of the equal protection of the laws "cannot be wrested from any class of citizens or from the citizens of any State by mere legislation," Cong. Globe 39th Cong., 1st Sess. at 1095 (1866), "keep[ing] the States within their orbits" and "keep[ing] whatever sovereignty [a State] may have in harmony with a republican form of government and the Constitution of the country," *id.* at 1088. The Amendment "declares particularly that no *State* shall do it—a wholesome

and needed check upon the great abuse of liberty which several of the States have practiced, and which they manifest too much purpose to continue." *Id.* app. at 256. Like their counterparts at the Founding, the Framers of the Fourteenth Amendment understood that limits on the authority of the states were necessary "to restrict the power of the majority and to protect the rights of the minority." *Id.* at 1095; *cf. The Federalist No. 10* (James Madison) (Clinton Rossiter ed., 1961) (discussing the need to ensure that "the majority" would be "unable to concert and carry into effect schemes of oppression").

At the Founding, the Supremacy Clause, which declares the Constitution to be the "supreme Law of the Land," rendering "any Thing in the Constitution or Laws of any State to the Contrary" null and void and binding "the Judges in every State," U.S. Const., art. VI, cl. 2, established the basic principle that where the Constitution limits state authority, state prerogatives necessarily end, limiting the power of state actors to flout the Constitution. Simply put, the Supremacy Clause makes clear that the people of a state may not adopt a state Constitution, or state laws, that transgress the federal Constitution and that state courts may not "dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Howlett v. Rose*, 496 U.S. 356, 371 (1990). This principle of constitutional supremacy is a "permanent and indispensable feature of our constitutional system." *Cooper v. Aaron*, 358 U.S. 1, 18, (1958). As James Madison argued, without a supreme federal power overseeing the states, our system of government would be a "monster, in which the head was under the direction of the members." *The Federalist No. 44, supra*, at 283 (James Madison).

The Framers chose to make this declaration of the Constitution's supremacy exceptionally broad in scope, rendering null and void all forms of state action inconsistent with the Constitution, federal laws, and treaties. As initially introduced by Anti-Federalist Luther Martin, the Supremacy Clause was anemic: Martin's proposal did not establish the Constitution as the supreme law of the land and would have allowed the people of a state to adopt a state constitution that conflicted with the federal Constitution. *See* 2 The Records of the Federal Convention of 1787, at 28-29 (Max Farrand ed., 1911); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1458 (1987) (noting that "when the supremacy clause was first introduced at Philadelphia . . . it pointedly failed to specify the supremacy of the federal Constitution over its state counterparts"). Fortunately, the Framers recognized that such a system of government would have "inver[ted] . . . the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts," *The Federalist No. 44*, *supra*, at 283 (James Madison), and they decisively rejected it. In contrast to Martin's initial proposal, the final form of the Supremacy Clause written into our Founding charter "[i]s continental: one Constitution, one land, one People." Amar, *Of Sovereignty and Federalism*, *supra*, at 1458.

State courts may not refuse to apply this Court's decision in *Obergefell* because they disagree with it. "The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us." *Cooper*, 358 U.S. at 19-20. But that is what the Arkansas Supreme

Court did, flouting its obligation to faithfully apply the precedents of this Court. This Court should grant review to enforce the Constitution's supremacy over the state laws at issue here because those laws are at odds with the Fourteenth Amendment, as the next Section discusses.

C. The Decision of the Court Below Is at Odds with the Text and History of the Fourteenth Amendment, as Well as This Court's Precedents

Consistent with the text and history of both the Fourteenth Amendment and the Supremacy Clause, this Court has recognized that the Equal Protection Clause protects minorities from state-sponsored discrimination at the hands of majorities, "withdraw[ing] from Government the power to degrade or demean" through the democratic process. *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013). Likewise, this Court has recognized that states may not deny to gay men or lesbians rights basic to "ordinary civic life in a free society" or "make them unequal to everyone else." *Romer v. Evans*, 517 U.S. 620, 631, 635 (1996).

In *Obergefell*, this Court followed these principles to their logical conclusion, holding that "the right to marry is a fundamental right inherent in the liberty of the person." 135 S. Ct. at 2604. Thus, "under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty." *Id.* In so holding, this Court recognized that "[t]he States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order." *Id.* at 2601. Thus, "by virtue of their exclusion from that institution, same-sex couples are denied the con-

stellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives." *Id.* at 2601; *see id.* (describing "birth and death certificates" as "aspects of marital status"); *id.* at 2600 (noting that marriage "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education").

The court below lost sight of these foundational equal protection principles, empowering the people of a state to "disparage and to injure" loving, committed same-sex couples, "whose moral and sexual choices the Constitution protects," *Windsor*, 133 S. Ct. at 2696, 2694, and denigrating their marriage to "second-tier" status, *id.* at 2694; *see Obergefell*, 135 S. Ct. at 2600-01. That contravenes *Obergefell*. While the people of a state may, through their state legislatures, create laws in the mine run of cases, *Obergefell* makes clear that they cannot contravene the Fourteenth Amendment's guarantee of equality of rights under the law, denying same-sex couples the same benefits associated with marriage provided to opposite-sex couples.

According to the court below, there is no tension between the Arkansas birth certificate statutes and the Fourteenth Amendment because the "purpose of the statutes is to truthfully record the nexus of the biological mother and the biological father to the child." Pet. App. 20a; *id.* at 21a ("It does not violate equal protection to acknowledge basic biological truths."). But the laws provide that, in the context of opposite-sex couples, the spouse of the biological mother should generally be listed on his child's birth certificate even if he is *not* the biological parent of the

child. Pet. 3; *see* Pet. App. 45a (Danielson, J., dissenting) (concluding that the state birth certificate statutes focus on "marital" relationships, not "biological relationships," and "[t]he obvious reason for this is to legitimate children whenever possible, even when biological ties do not exist").

In fact, Arkansas law "expressly provides that when a married couple uses donor insemination to have a child," as petitioners did here, "the child is 'deemed the legitimate natural child of . . . the woman's husband,' and the husband is the child's legal father." Pet. 4 (citing Ark. Code § 9-10-201(a)). Thus, the state's purported rationale provides no basis for denying petitioners here the right to have both parents listed on their children's birth certificates when similarly situated individuals in opposite-sex marriages would be so listed as a matter of course. The state's laws that abridge that right violate the Fourteenth Amendment, denying same-sex married couples the full constellation of benefits associated with marriage under state law and treating them differently than similarly situated opposite-sex married couples.

Significantly, if lower courts can deny same-sex couples the same benefits of marriage accorded to opposite-sex couples on so flimsy a rationale as the one offered here, it would permit lower courts to, in effect, disregard this Court's decision in *Obergefell* merely because they disagree with it. Indeed, as the Petition argues, allowing the decision here "to stand would open the door for other courts to pursue a similarly blatant path of denying same-sex couples important marital rights and protections based on equally specious grounds . . . . This Court should grant review to foreclose that destabilizing path." Pet. 25.

This Court should not countenance the decision of the court below to violate this Court's precedents and "impose stigma and injury of the kind prohibited by our basic charter." *Obergefell*, 135 S. Ct. at 2602. This Court should grant review and hold that the decision below violates the Constitution's equal protection guarantee.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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March 15, 2017

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MOTION
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AND
BRIEF

No. 16-992

In The
Supreme Court of the United States

MARISA N. PAVAN, ET AL.,

Petitioners,

v.

NATHANIEL SMITH, M.D., MPH,

Respondent.

On Petition For A Writ Of Certiorari To The Arkansas Supreme Court

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* FAMILY EQUALITY COUNCIL AND COLAGE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION

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MOTION OF AMICI CURIAE FAMILY EQUALITY COUNCIL AND COLAGE FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONERS

Amici Curiae Family Equality Council and COLAGE respectfully move for leave of Court to file the accompanying brief under Supreme Court Rule 37.3(b). Amici timely notified counsel of record for all parties more than ten days prior to the date of filing that Amici intended to file the brief and sought the parties' consent to the filing. Counsel for Petitioner provided consent and proof of the same has been lodged with the Clerk of the Court. Counsel for Respondent has not provided consent.

In this brief, Family Equality Council and COLAGE seek to provide insight into the concerns and experiences of children raised by same-sex couples who have been affected by unequal treatment of their families and, in particular, by the unavailability of birth certificates that name both of their parents. Family Equality Council, a non-profit organization, is well suited to provide this important perspective through its work supporting and representing this country's millions of lesbian, gay, bisexual, transgender, and queer parents and their children. Through Family Equality Council's Outspoken Generation program, children of same-sex couples and LGBT parents speak out about their families, share their stories, and become advocates for family equality. COLAGE is the only national organization for and led by people with a lesbian, gay, bisexual, transgender, or queer parent.

Based on its direct experience working with thousands of youth over the past 26 years, COLAGE can attest to the critical importance of recognizing and respecting these families on all levels: socially, institutionally, politically, and legally.

The accompanying brief of Family Equality Council and COLAGE shares the stories, worries, and views of individuals uniquely impacted by the issues before the Court: children of same-sex couples. Their perspective underscores the real-life impact of the Arkansas decision and the myriad practical, dignitary, and emotional harms that flow from permitting different birth certificate regimes for married couples depending on whether the spouses are of the same or different sexes.

Family Equality Council and COLAGE therefore request leave to file the accompanying brief of Amici Curiae in support of the petition for a writ of certiorari.

Respectfully submitted,

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INTEREST OF AMICI CURIAE[1]

Amici Curiae are organizations dedicated to promoting equality among our country's diverse families, in particular those comprised of lesbian, gay, bisexual, or transgender parents, same-sex couples, and their children. In this brief, Amici offer the stories of children of same-sex couples to convey the significance for them of having both of their parents named on their birth certificates and to underscore the harm the Arkansas Supreme Court decision inflicts by sanctioning inferior treatment for families with same-sex parents.

Family Equality Council is a community of parents and children, grandparents and grandchildren that reaches across the country, connecting, supporting, and representing LGBT parents, same-sex couples, and their children. Family Equality Council works extensively with the children of same-sex couples and LGBT parents, including through its Outspoken Generation program, which empowers these children to speak out about their families, share their own stories and become advocates for family equality. Family Equality Council submits this brief on behalf of all of the young people with whom it has worked.

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[1] Written consent to the filing of this brief was sought of all parties more than ten days before the filing of this brief. Only Petitioner consented, and proof of such consent is being lodged with this brief. Accordingly, a motion for permission to file this amicus brief is included herewith. No counsel for a party authored this brief, in whole or in part, and no person other than Amici Curiae, their members, and their counsel made any monetary contribution to fund the preparation or submission of this brief.

COLAGE is the only national organization for and led by people with a lesbian, gay, bisexual, transgender, or queer parent. COLAGE approaches its work with the understanding that living in a world that discriminates against and treats these families differently can be isolating and challenging for children. Based on its direct experience in working with thousands of youth over the past 26 years, COLAGE can attest to the critical importance of recognizing and respecting these families on every level – socially, institutionally, politically, and legally.

SUMMARY OF ARGUMENT

In most families, parents and children can take for granted that the children's birth certificates will name both of their parents, regardless of whether they share a genetic link. They can do so because state law has evolved over time to reflect that the parent-child relationship is not limited by biology.

In Arkansas, for example, when a child is born to a mother married either at the time of conception or birth or between conception and birth, the name of the woman's husband is entered as the father of the child on the birth certificate, regardless of whether the husband is the biological father of the child. Ark. Code § 20-18-401(f)(1). When a married couple uses donor insemination to conceive a child, the husband is the child's legal father and is named on the birth

certificate. Ark. Code §§ 9-10-201(a) & 20-18-401(f)(1)(A), (B). And when a child born in Arkansas is adopted, the State issues a new birth certificate – indistinguishable from an original – reflecting the adoptive parents as the child's legal parents. Ark. Code § 20-18-406(a)(1); Ark. Code R. § 007.12.1-5.5(a).

With this Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), came the right to marry and access to the "constellation of benefits that the States have linked to marriage," *id.* at 2601, such as the right under Arkansas law for a birth mother's spouse to be listed as a parent on their child's birth certificate. Or so it appeared.

Petitioners are legally married couples who conceived children through donor insemination, gave birth, and, pursuant to state law, sought to have both parents' names listed on their children's birth certificates. *Smith v. Pavan*, 505 S.W.3d 169, 172-73 (Ark. Sup. Ct. 2016). The Arkansas Department of Health, however, listed only one parent – the birth parent – on each certificate. *Id.*

Despite this Court's ruling in *Obergefell*, the Supreme Court of Arkansas held that the state need not treat spouses of same-sex couples and spouses of different-sex couples equally when it comes to issuing birth certificates. *Id.* Specifically, it held that the state need not identify same-sex spouses as parents on their children's birth certificates. In applying Arkansas law to married couples differently, depending on whether

spouses are of the same or different sexes, the Arkansas Supreme Court's decision undermines marriage equality and its attendant benefits and harms the children of same-sex couples.

Amici offer the perspectives of children raised by same-sex couples, all of whom share the same interest in legally accurate birth certificates as their counterparts born to different-sex couples do. These individuals are uniquely positioned to explain how children are harmed when their families are treated as different and inferior. Their experiences will help the Court understand what the Arkansas decision means and why this Court should grant review.

ARGUMENT

I. CHILDREN OF SAME-SEX PARENTS NEED BIRTH CERTIFICATES THAT LIST BOTH PARENTS FOR THE SAME REASONS OTHER CHILDREN DO

She brought me to the hospital, and the doctors wouldn't treat me because they couldn't prove she was my "real" mom because she wasn't on my birth certificate.

Kinsey Morrison, raised by two mothers[2]

[2] Statement from Kinsey Morrison to Family Equality Council (Feb. 23, 2017). All statements cited in this brief are on file with amicus Family Equality Council.

Birth certificates – which Arkansas' Department of Health calls "the definitive legal documents of identity"[3] – serve important legal and practical functions. A birth certificate is "the only common governmentally-conferred, uniformly-recognized, readily-accepted record that establishes identity, parentage, and citizenship, and it is required in an array of legal contexts." *Henry v. Himes*, 14 F. Supp. 3d 1036, 1050 (S.D. Ohio), *rev'd sub nom.*, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Under Arkansas law, a birth certificate is *prima facie* proof of parentage,[4] and, as such, is a critical document affecting the child's legal rights and benefits from early childhood on, including the child's schooling, medical care, right to state and federal benefits, right to care for his or her parent, inheritance rights, and death benefits.

A birth certificate can affect who may enroll a child in school, who may pick the child up from school, who may be listed as an emergency contact, and who, in general, may make educational decisions. As Elliott Emfinger, a young woman raised by two mothers in Birmingham, Alabama, remembers: "[W]hen I first

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[3] Arkansas Dep't Health, *ADH: Vital Records/Statistics*, *available at* http://www.healthy.arkansas.gov/programsServices/certificatesVitalRecords/Pages/default.aspx.

[4] Ark. Code § 20-18-305(5).

started kindergarten, Sibbie wasn't allowed to sign me out of school. It was ridiculous – she's my *mom*."[5]

Many children in Arkansas are in the same position Elliott was. For example, the rules of some Arkansas public schools allow only those parents named on the child's birth certificate to receive educational information absent a court order.[6] And in many states, a birth certificate may be required to enroll the child in school.[7]

Even more critically, a child whose parent is not listed on a birth certificate may face delay in emergency medical care as doctors determine whether a parent has authority to consent to the child's treatment.

Unfortunately, this risk is not hypothetical. Kinsey Morrison, a young woman raised in Kentucky by

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[5] Elliott Emfinger, "I Helped My Moms (Finally) Get Married!" SEVENTEEN (June/July 2015), *available at* http://www.seventeen.com/life/real-girl-stories/a31943/i-helped-my-moms-finally-get-married/; Statement from Elliott Emfinger to Family Equality Council (Nov. 3, 2015).

[6] *Bryant Pub. Schools Student Handbook* 14, *available at* http://bryantschools.org/system/files/documents/570/Elementary%20Handbook%202016-17.pdf.

[7] *See* Ark. Code R. § 005.15.2-11.02 ("A birth certificate, Social Security Number, or other documentation, as provided by law, shall be required to enroll in school."); Ohio Rev. Code Ann. § 3313.672(A)(1) (birth certificate among documents to be presented upon entry to school); La. Rev. Stat. § 17:167 ("All children upon entering a parish or city school system or private school in the state of Louisiana for the first time shall be required to present a copy of their official birth record to the school principal.").

her two mothers, had a life-threatening reaction to a vaccine when she was just a week old. But the mother who brought Kinsey to the hospital was not listed on Kinsey's birth certificate. Because hospital staff "couldn't prove she was [Kinsey's] 'real' mom," they would not begin medical care:

> My [birth] mom Karen had to get to the hospital before they would treat me, and she had to check me in and sign the insurance paperwork.[8]

To add insult to injury, Kinsey's other mother, Audrey, had to wait in the hall as doctors worked on her infant daughter.[9]

Kinsey's mothers have since married, and both of their names now appear on the birth certificates of their three children. Kinsey, now a college student, recounts that just a few weeks ago, Audrey was required to "show 'proof of parenthood'" to take Kinsey's younger sister to the doctor. "[I]f she hadn't had [my sister's] birth certificate, they would have been turned away."[10]

Unfortunately, what happened when Kinsey was a baby is not unusual. Eleven-year-old K.S. has been raised by two mothers in Mobile, Alabama. He knows them as equal parents: "We play games, watch movies,

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[8] Kinsey Morrison, *supra* n. 2.

[9] Statement from Kinsey Morrison to Family Equality Council (Feb. 27, 2015).

[10] Kinsey Morrison, *supra* n. 2.

go to the beach and have fun. My Mommo picks me up from school every day, and my Mommy makes the best fried chicken."[11] But when K.S. was just three months old, a heart condition required open-heart surgery, and his non-birth mother was not permitted to assist in his hospital care because she did not have paperwork proving she was his parent.[12]

Birth certificates also impact other important areas of children's lives. These include obtaining survivor benefits through social security,[13] enrolling a new child in a parent's health insurance plan, verifying parental relationship under various federal statutes,[14] claiming

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[11] Statement from K.S. to Family Equality Council (Nov. 2, 2015). Minor children quoted in this brief do not seek anonymity. Initials are used for minors pursuant to the Court's direction in the context of merits briefs that names of minor children "should not be included in either the paper or the electronic version of a filing." Court's Guidelines for Electronic Submission of Briefs on the Merits (Oct. 1, 2013).

[12] Statement from Cari S. to Family Equality Council (Nov. 3, 2015).

[13] *Survivors Benefits*, Social Security Administration, *available at* https://www.ssa.gov/pubs/EN-05-10084.pdf at 5; *Information You Need To Apply for Child's Benefits – Form SSA-4*, Social Security Administration, *available at* https://www.ssa.gov/forms/ssa-4.html.

[14] *See, e.g.*, 20 C.F.R. 401.45(b)(6) (allowing birth certificate to verify relationship in connection with a request to the Social Security Administration on behalf of a minor); 31 C.F.R. 1.34 (birth certificate can establish parentage for a minor declared incompetent under Treasury Department regulations); 45 C.F.R. 5b.5(b)(2)(iii) (birth certificate can establish relationship to minor in connection with public welfare records); 29 C.F.R. 825.122(k) (birth certificate as evidence of relationship to care for parent or child under Family and Medical Leave Act).

dependency benefits through worker's compensation,[15] and establishing entitlement to other state benefits.[16]

A birth certificate is generally required to obtain a passport for a minor child,[17] which can present particular challenges if the non-birth parent who is not on the birth certificate is the only U.S. citizen parent. A child's ability to travel alone with the parent not listed on the birth certificate can also be impeded, as some countries require a birth certificate when one parent travels alone with a child.[18] The U.S. Department of State recommends that LGBT parents traveling outside the country "consider carrying documents regarding parentage and/or custody for accompanying minor children."[19]

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[15] *See In re Rodriguez*, No. F508002, 2006 WL 2303317, at *1 (Ark. Work. Comp. Comm'n July 10, 2006) (referring to birth certificates as "necessary" in "establishing dependency benefits").

[16] *See, e.g.*, Ark. Code § 24-12-117(b) (birth certificate serves as proof in connection with survivor benefits for certain public officers and employees); Ark. Code R. § 208.00.1-2212 (birth certificate serves as proof of parental relationship when applying for Transitional Employment Assistance).

[17] *See* 22 C.F.R. 51.28(a)(2) and (3)(ii)(A); *Children Under 16*, U.S. Department of State, *available at* https://travel.state.gov/content/passports/en/passports/under-16.html.

[18] *See, e.g.*, *Minor Children Traveling To Canada*, Government of Canada, *available at* http://www.cic.gc.ca/english/visit/minors.asp (minors travelling to Canada with only one parent should present, *inter alia*, the child's birth certificate as well as a letter of authorization from the non-travelling parent).

[19] *See LBGT Travel Information*, U.S. Department of State, Bureau of Consular Affairs, *available at* https://travel.state.gov/content/dam/students-abroad/pdfs/LGBTIflyer.pdf.

Anna Frackman, a medical student who grew up in Madison with her two mothers notes that:

> [In Wisconsin], there is a determination for next of kin, and you go down the line of choices and for our family, we don't fit into that list. We do not have a document that includes all of our names, that identifies us as a family.[20]

In *Obergefell*, this Court recognized that "birth and death certificates" are among the "aspects of marital status" that were denied to same-sex couples who were barred from marrying. 135 S. Ct. at 2601. Yet the Arkansas Supreme Court's decision would allow the state to continue denying this critical benefit to a subset of its married couples: those with spouses of the same sex.

"The inability to obtain an accurate birth certificate saddles" the children of these couples "with the life-long disability of a government identity document that does not reflect the child[ren]'s parentage and burdens the ability of the child[ren]'s parents to exercise their parental rights and responsibilities." *Henry*, 14 F. Supp. 3d at 1050.

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[20] Statement from Anna Frackman to Family Equality Council (Feb. 24, 2017).

II. AS THE COURT RECOGNIZED IN *WINDSOR* AND *OBERGEFELL*, TREATING FAMILIES DIFFERENTLY BECAUSE THEY ARE HEADED BY SAME-SEX PARENTS HARMS CHILDREN

> *When we hear the term "paperwork" our minds jump to boring things. But . . . a lot of the issues we are discussing revolve around paperwork and the power that it gives you. As an adopted child, and as a foster child, that paperwork means more to me than you will ever know.*
>
> Anthony Hynes, raised by two mothers[21]

> *For me it's more an issue of respect and legitimacy. These are my parents who raised me. They got up at four in the morning to drive me to volleyball tournaments. I can't believe what they did for me.*
>
> Anna Frackman, raised by two mothers[22]

In *Obergefell*, this Court rejected marriage laws that "harm[ed] and humiliate[d] the children of same-sex couples." 135 S. Ct. at 2600-01. Before that, the Court rejected the Defense of Marriage Act, which had made it more difficult for "tens of thousands of children . . . being raised by same-sex couples . . . to understand the integrity and closeness of their own family and its concord with other families in their community and

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[21] Statement from Anthony Hynes to Family Equality Council (Feb. 24, 2017).

[22] Anna Frackman, *supra* n. 20.

their daily lives." *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

When the Arkansas Supreme Court held that a state agency can refuse to name the spouse in a same-sex married couple on the birth certificate of their child – though it clearly could not refuse if the married couple is of different sexes – it sanctioned a legal framework "where children" once again "suffer the stigma of knowing their families are somehow lesser." *Obergefell*, 135 S. Ct. at 2600.

Spencer Lucker, who grew up in Little Rock, Arkansas with his two mothers, knows exactly what this means for children born to same-sex parents:

> Despite my parents having lived together and pursued thirteen artificial insemination procedures together as a couple (I was conceived on the thirteenth try), when I was born my [birth] mother was the only one allowed to be listed on my birth certificate.

When Spencer was born, marriage was not available to his parents. After 38 years together, Spencer's parents were finally able to marry. Under the Arkansas Supreme Court decision, however, if Spencer were born to his two parents today, he would still only have one parent's name on his birth certificate.

Spencer, now 29 years old, explains that "the parent on the [birth certificate] was something that would always come up":

> When you have to present your [birth certificate] it's a strong reminder, when only one of your parents is on the document, your family is different than everyone else's. Beyond the legal, it has an emotional and psychological element that is always underpinned for a kid growing up in the South.[23]

Denying same-sex spouses the full benefits of marriage – including listing both parents' names on their children's birth certificates – is a stark message to children that the government does not consider their parents' marriage to be the same as the marriages of different-sex couples. Seventeen-year-old J.M. from Kentucky explains: "Having both of my parents on my birth certificate validated the love my moms have for me. And without both parents being on there, that legitimacy would've been threatened daily."[24]

Anna Frackman, whose non-birth mother's name is missing from Anna's birth certificate, acknowledges that the incomplete document still creates complications from time to time. It came up, for example, when she was renewing her driver's license recently. But for Anna, "it's more an issue of respect and legitimacy." [25]

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[23] Statement from Spencer Lucker to Family Equality Council (Feb. 24, 2017).

[24] Statement from J.M. to Family Equality Council (Feb. 24, 2017).

[25] Anna Frackman, *supra* n. 20.

Anthony Hynes, 27, echoes this sentiment:

> I did not have one mom growing up – I had two, both of whom deserved full recognition on my birth certificate.

Anthony stresses that although having both parents on a birth certificate makes life easier "for a host of reasons," something also "needs to be said for the psychological impact having both parents on a birth certificate can have on a child." According to Anthony:

> From a psychological standpoint, the ability to have the same paperwork as other families is an affirmation of who – of what – we are: a family.
>
> I wanted a birth certificate that had both of my moms' names on it because I knew other kids had their parents' names on their birth certificates. I wanted my moms' names on my birth certificate so I could look back one day and show my own children a birth certificate representing an integral part of our family history.[26]

Molly Goren-Watts was raised by two mothers in New York and then Vermont. For the first twelve years of her life, only Molly's birth mother was listed on her birth certificate. As Molly recalls: "My birth certificate was just one piece of the entire picture of not being recognized as a family by most of the world around us."

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[26] Anthony Hynes, *supra* n. 21.

When Molly's non-birth mother adopted her, her parents were able to obtain a new birth certificate listing both names, but only after "a pretty arduous process" as New York officials struggled to figure out how to "change the form," and with one of Molly's mothers listed as her "father." As Molly explains:

> We were able to be validated and recognized in some way, but the experience also showed that they were trying to find a workaround to get our family to fit into their system – into their boxes.[27]

Now 37, Molly lives in Massachusetts with a wife and two children of her own. She is struck by the contrast between her childhood experience and that of her children:

> I was automatically on my children's birth certificates. We were always recognized as a family by the hospital and town clerks. The fact that they knew how to treat me and us – we were immediately legitimized.
>
> I think back on my experiences as a child of not fitting into the boxes or definitions that society had for us and my family not being validated – feeling like I had to always explain my family. . . . [Now] as the non-bio parent, I'm on the paperwork, on the birth certificate, there's never a question and either one of us can go into school and to the doctor and sign paperwork. To go into the clerk's office and . . .

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[27] Statement from Molly Goren-Watts to Family Equality Council (Feb. 28, 2017).

> [be] able to get copies of birth certificates when we need them – it blows my mind because of how easy it is. Being part of the system, being recognized, makes us feel like part of the community.[28]

Spencer Lucker notes that when his mothers were finally able to marry, adding his non-birth mother to Spencer's birth certificate "was the first thought that we had as a family." This, Spencer points out:

> says a lot about what it means, and how important a birth certificate is, in the eyes of the law, what it means for one's self-identity. Changing my [birth certificate] is symbolic for us as a family but it legitimizes my family in the same way [my mothers'] marriage certificate legitimizes their relationship.

Spencer emphasizes that his non-birth mother, Mary, "spent 29 years raising [him] and investing in [him]."

> She's just as much my parent. The significance of finally being able to confirm that all of the sacrifices she made, my parents made, and that I have made are worth it and are legitimate speaks to the psychological impacts of documentation that confirms your family structure, your history.

And now that Spencer is looking forward to having children of his own, he is struck by the importance of a

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[28] *Id.*

birth certificate that "further confirms [his] children's lineage and will connect Mary to her grandkids."[29]

Anna Frackman will soon be adopted by her non-birth mother and may then finally obtain a birth certificate that identifies both her parents. But she admits to some ambivalence about destroying what she sees as evidence of a time she hopes has passed forever:

> The whole progression of same-sex marriage rights is part of my story, and my birth certificate without my second mom's name on it is part of my story. . . . I lived through this time where my family didn't have legal recognition, and I want that to remain part of my narrative – I wish it wasn't, but it is.
>
> But now we are in a different world – kids born now don't need it to be part of their story. They don't have to experience what I did. This was something I and my family fought for so that future generations could have it.[30]

CONCLUSION

Children born to married couples in Arkansas receive birth certificates that identify both spouses as parents. Unless the spouses are of the same sex.

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[29] Spencer Lucker, *supra* n. 23.

[30] Anna Frackman, *supra* n. 20.

Though these children need birth certificates that name both parents as much as other children do, the Arkansas Supreme Court has said that their parents' marriages are different and that the state need not treat them the same when applying marriage-based laws.

In addition to the practical – and potentially dire – consequences of depriving children of birth certificates that list both of their parents, the Arkansas Supreme Court's decision would have us return to a world where states are free to "harm and humiliate the children of same-sex couples," causing them to "suffer the stigma of knowing their families are somehow lesser." *Obergefell*, 135 S. Ct. at 2600-01. This Court should grant the petition for writ of certiorari to prevent that harm and fulfill *Obergefell*'s promise of equality for the families of children with same-sex parents.

Respectfully submitted,

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RIEF.

Nos. 16-992

IN THE
SUPREME COURT OF THE UNITED STATES

MARISA N. PAVAN, ET AL.,
Petitioners,

v.

NATHANIEL SMITH,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* FAMILY LAW PROFESSORS IN SUPPORT OF PETITIONERS AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE

Amici curiae—54 family law professors—respectfully move for leave to file an *amici curiae* brief in support of petitioners under Rule 37.2(b). *Amici curiae* are family law professors with substantial knowledge of state family laws concerning birth certificates, marriage, and parentage, as well as the harms that can result when a parent is not named on a birth certificate. *Amici curiae* request permission to file a brief explaining how Arkansas's refusal to place same-sex spouses on their children's birth certificate is inconsistent with the rules governing birth certificates.

In accordance with Rule 37.2(a), *amici curiae* notified Petitioner of *amici curiae*'s intent to file this brief more than 10 days before the due date, and petitioner granted consent. *Amici curiae* have submitted a copy of this consent to the court as proof of consent.

Respondent also received notice of intent to file more than 10 days before the due date per Rule 37.2(a). However, Respondent did not grant consent. Respondent instead informed counsel for *amici curiae* that, according to its policy, respondent will only provide consent after seeing a copy of a brief in advance. This request was not feasible with *amici curiae*'s drafting and research schedule. Accordingly, counsel for *amici curiae* informed respondent that it would file a motion for leave to file this brief, as provided for under Rule 37.2(b). Respondent stated it would "take no position" with regard to this motion

for leave to file rather than opposing this motion for leave to file.

Amici curiae family law professors therefore respectfully request that the court grant their unopposed motion to file their *amici curiae* brief.

Respectfully submitted,

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March 15, 2017

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INTEREST OF AMICUS CURIAE[1]

Amici curiae – 54 family law professors – respectfully submit this brief in support of Marisa N. Pavan, et al.'s petition for a writ of certiorari. *Amici* are law professors with a significant focus on family law.[2] *Amici* have substantial knowledge of, and experience with, the state family laws that address marriage, parentage, and birth certificates, as well as the harms that parents and their children confront when they are denied legally accurate birth certificates. This brief explains that Arkansas's refusal to place same-sex spouses on their children's birth certificates is inconsistent with the rules governing birth certificates. This brief also describes how this unequal and discriminatory treatment harms the security, stability, and dignity of same-sex parent families.

SUMMARY OF ARGUMENT

In *Obergefell v. Hodges*, this Court held that same-sex couples could not be excluded from the

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[1] Pursuant to Rule 37.6, amici curiae certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici or their counsel, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. Petitioners' consent has been filed with the Clerk with this brief. As explained in the accompanying motion, Respondent received timely notice of intent to file but did not provide consent.

[2] Amici professors are listed in Appendix.. Their institutional affiliations are listed for identification purposes only.

institution of marriage or the "constellation of benefits that the States have linked to marriage." 135 S. Ct 2584, 2601 (2015). Nonetheless, the Arkansas Supreme Court has denied same-sex spouses the right to have both of them included on the birth certificate of their child, even though different-sex spouses in the same position would be placed on the birth certificate as a matter of course. This holding flouts this Court's rulings in *Obergefell* and *United States v. Windsor*, 133 S. Ct. 2675 (2013), subjects these families to unequal treatment, and threatens the dignity and stability of the families of same-sex couples.

Birth certificates are legal documents that record a child's date and place of birth, as well as the names of the child and the parents. Under the laws of Arkansas and other states, husbands are placed on the birth certificate of a child born to their wives without any proof of biological connection to the child, even when the child is conceived from artificial insemination and there is indisputably no biological connection between the husband and the child. Arkansas is refusing to apply these rules equally to married same-sex couples.

As a result of Arkansas' discriminatory application of its rule, same-sex families are denied critical tangible protections and are stigmatized when state officials refuse to list both same-sex spouses on their child's birth certificate. As discussed below, some of these tangible and intangible harms were demonstrated to the Court two terms ago by the anguishing experiences of some of the plaintiffs in *Obergefell*. Birth certificates

provide security to families because they are universally accepted and commonly required as proof of parentage. Parents rely on birth certificates to prove to hospitals and health-care providers that they have the right to make health-care decisions for their children, to enroll their children in school and childcare, and to travel internationally with them. Birth certificates are important in a host of other extraordinary, as well as ordinary, moments in life.

The Arkansas Supreme Court's opinion defies this Court's decisions in *Obergefell* and *Windsor* and therefore warrants certiorari.

REASONS FOR GRANTING THE WRIT

I. BIRTH CERTIFICATES ARE RECORDS OF LEGAL PARENTAGE.

A birth certificate is "the only common governmentally-conferred, uniformly recognized, readily-accepted record that establishes identity, parentage, and citizenship, and it is required in an array of legal contexts." *Henry v. Himes*, 14 F. Supp. 3d 1036, 1050 (S.D. Ohio), *aff'd sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The primary purpose of a birth certificate is to document a child's *legal* parentage, date and place of birth, and citizenship. *See, e.g., Henry*, 14 F. Supp. 3d at 1052 ("An Ohio birth certificate is a legal document, not a medical record."); *see also Raftopol v. Ramey*, 12 A.3d 783, 793 (Conn. 2011) ("A birth certificate is a vital record that must accurately reflect *legal* relationships between parents and children") (emphasis added). And, indeed, as the discussion

below demonstrates, that is how they are used; birth certificates are relied upon by a range of state, federal, and international officials as evidence of legal parentage even far beyond the borders of the state that issues them.

A child's legal parents are often also the biological parents, but sometimes they are not. In Arkansas, as in all other states, there are a variety of circumstances in which people who are not biological parents must be named on a child's birth certificate. For example, Arkansas law ***requires*** that a husband be listed on the birth certificate. Arkansas Code § 20-18-401(f)(1) ("[I]f the mother was married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child."). This is consistent with the birth certificate rules in other states. *See, e.g.*, Model Vital Statistics Act § 11(h) ("If the mother was married at the time of either conception or live birth, or between conception and live birth, the name of the husband [spouse] shall be entered on the report as the (father, parent) of the child, unless parentage has been determined otherwise by a court of competent jurisdiction.") (Brackets in original.)

Husbands must not only be named on the birth certificate of a child born to their wives; they cannot be removed from that birth certificate except in very limited circumstances. Undisputed evidence of a husband's lack of biological parentage is ***not sufficient***; the husband's name can be removed from the birth certificate only if there is a court order establishing someone else's paternity, or the wife,

husband, ***and*** putative father have signed affidavits attesting to the paternity of the putative father. *Id.*

These birth certificate rules are based on and reflect the universal rules governing the parentage of children born to married couples in the United States. In Arkansas, and every other state, a husband is ***presumed*** to be the legal parent of his wife's child without proof of a genetic connection. *See* Ark Code § 20-18-401(f)(1)(A) and (B). *See also* Leslie Harris, Lee E. Teitelbaum, June R. Carbone, Family Law 865 (Aspen Publishers, 5th ed. 2014) ("In all states a child born to a married woman is at least rebuttably presumed to be the child of her husband."). The unanimity of state law on this issue derives from deep common law roots. *See Michael H. v. Gerald D.*, 491 U.S. 110, 124-25 (1989) ("The presumption of legitimacy was a fundamental principle of the common law. ... The primary policy rationale underlying the common law's severe restrictions on rebuttal of the [marital] presumption appears to have been an aversion to declaring children illegitimate .... A secondary policy concern was the interest in promoting the 'peace and tranquility of States and families.'"). (Citation omitted). Moreover, under Arkansas law, a husband's presumed parentage cannot be rebutted even when a child's biological father has been identified and is interested in being adjudicated the legal father, unless a court finds that "rebutting that presumption is in the best interest of a child." *R.N. v J.M.*, 61 S.W.3d 149, 155 (Ark. 2001).

In addition to the general marital presumption, almost all states also expressly confer

legal parentage on a spouse who consents to the use of assisted reproductive technologies such as in vitro fertilization or donor insemination.[3] Arkansas, again, is one of those states. *See, e.g.*, Ark. Code Ann. § 9-10-201(a) ("Any child born to a married woman by means of artificial insemination shall be

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[3] *See, e.g.*, Ala. Code § 26-17-702 (2017); Alaska Stat. Ann.§ 25.20.045 (2017); Ariz. Rev. Stat. Ann. § 25-501(B) (2016); Ark. Code Ann.§ 9-10-201(a) (2017); Cal. Fam. Code § 7613(a) (2017); Colo. Rev. Stat. Ann. § 19-4-106(1) (2016); Conn. Gen Stat. Ann. § 45a-774 (2016); D.C. Code § 16-909(e)(1) (2017); Del. Code Ann. tit. 13, § 8-703 (2017); Fla. Stat. Ann. § 742.11 (2017); Ga. Code Ann.§ 19-7-21 (2016); Idaho Code Ann. § 39-5405(3) (2017); 750 Ill. Comp. Stat.40/3(a) (2016); La. Civ. Code Ann. art.188 (2017); Md. Code Ann., Est. & Trusts § 1-206(b) (2017); Me. Rev. Stat. tit. 19-A, § 1923 (2017); Mass. G. L. c. 46, §4B (2016); Mich. Comp. Laws Ann. § 333.2824(6) (2016); Minn. Stat. Ann. § 257.56(1) (2016); Mo. Ann. Stat. § 210.824(a) (2017); Mont. Code Ann. § 40- 6-106(1) (2017); Nev. Rev. Stat. Ann. § 126.670 (2016); N.C. Gen. Stat. Ann. § 49A-1 (2017); N.D. Cent. Code Ann. § 14-20-61 (703) (2016); N.H. Rev. Stat. Ann. § 168-B:2(II) (2016); N.J. Stat. Ann. § 9:17- 44(a) (2017); N.M. Stat. Ann. § 40-11A-703 (2016); N.Y. Dom. Rel. Law § 73(1) (2015); Ohio Rev. Code Ann. § 3111.95(A) (2016); Okla. Stat. Ann. tit. 10, § 552 (2016); Or. Rev. Stat. § 109.243 (2016) (held unconstitutional as applied to same-sex couples who could not then legally marry in *Shineovich v. Shineovich*, 229 Or. App. 670, 686 (Ct. App. 2009); *see In re Registered Domestic P'ship of Madrone*, 271 Or. App. 116, 350 P.3d 495 (Ct. App. 2015) (extending marital presumption to same sex partner who would have married if the choice had been available); Tenn. Code Ann. § 68-3-306 (2016); Tex. Fam. Code Ann. § 160.703 (2016); Utah Code Ann. § 78B- 15-703 (2016); Va. Code Ann. § 20-158(A)(2) (2017); Wash. Rev. Code § 26.26.710 (2016); Wis. Stat.§ 891.40(1) (2017); and Wyo. Stat. Ann. § 14-2-903 (2016). *See also* Model Vital Statistics Act § 11(h); Uniform Parentage Act §§ 702-703 (2002).

deemed the legitimate natural child of the woman and the woman's husband if the husband consents in writing to the artificial insemination."). In Arkansas, as in other states, a husband who consents to his wife's insemination is a legal parent and is listed on their child's birth certificate, even when all parties know he is not the child's biological parent. Arkansas Code § 20-18-401(f)(1).

Parents adopting children are also named on birth certificates even though those parents share no biological connection with their adopted child. Consistent with the law and practice in all states, upon adoption of a child, Arkansas issues a revised birth certificate with the names of the adoptive parents entered as the child's parents. Ark. Code § 20-18-406(a)(1). The new birth certificate is indistinguishable from the child's original certificate and does not flag the absence of biological connection to the adoptive parent or parents. Code Ark. R. 007.12.5-5.5(a).

In short, a birth certificate, in Arkansas as in other states, is a record of legal parentage.

II. ARKANSAS REFUSAL TO GRANT BIRTH CERTIFICATES ON EQUAL TERMS TO MARRIED SAME-SEX COUPLES INFLICTS HARM ON THOSE COUPLES AND THEIR CHILDREN.

Birth certificates are among the most important and universally recognized items in the "constellation of benefits that the States have linked to marriage." *Obergefell*, 135 S. Ct 2584, 2601

(2015). A birth certificate affirms the family's integrity in the face of doubt, provides ready access to other legal protections, and allows engagement in many ordinary transactions where parent-child status is of concern. Arkansas's refusal to provide this documentation on an equal basis to all married parents thrusts children of married same-sex couples into a second-class status and denies these families tangible protections as well as the dignity to which they are entitled.

Children who lack a birth certificate reflecting their legal parents "suffer the significant material costs ... relegated through no fault of their own to a more difficult and uncertain family life." *See Obergefell*, 135 S. Ct. 2584. Birth certificates are treated nearly universally as the critical evidence of the legal parent-child relationship. As one of the district courts affirmed in *Obergefell* explained:

> Identification on the child's birth certificate is the basic currency by which parents can freely exercise ... protected parental rights and responsibilities. It is also the only common governmentally-conferred, uniformly-recognized, readily-accepted record that establishes identity .... The inability to obtain an accurate birth certificate saddles the child with the life-long disability of a government identity document that does not reflect the child's parentage and burdens the ability of the child's parents to exercise

> their parental rights and responsibilities.

Henry v. Himes, 14 F. Supp. 3d 1036, 1050 (S.D. Ohio 2014), *aff'd sub nom Obergefell*, 135 S. Ct. 2584.

A. Medical Decisions

Medical emergencies underscore the risk families face when they lack birth certificates accurately reflecting their child's legal parentage. In these heart-wrenching situations, a child's life and health may depend upon a parent's ability to make quick decisions on the child's behalf. However, medical providers may insist on seeing a birth certificate to verify a parent's right to make decisions or to have any involvement in a child's medical care. *See, e.g.*, *Tanco v. Haslam*, 7 F. Supp. 3d 759, 764 (M.D. Tenn. 2014) *aff'd sub nom Obergefell*, 135 S. Ct. 2584 (describing how [the non-biological parent] had been deprived of "the right to ... make medical decisions regarding the medical care provided to their baby in the event that [the biological parent was] unable to make those decisions."); *see also* Petitioner's Brief at 10, *Obergefell*, 135 S. Ct. 2584 (2015).

This harm is not hypothetical. In several earlier cases, lesbian and gay parents had a difficult time taking care of their ill children because they were not accurately listed on their children's birth certificates. In one case, the omission of a parent from the birth certificate increased the anguish that the family faced upon the hospitalization of their

infant. Because one spouse was not listed on the child's birth certificate, the parents

> feared that [the spouse] would not be able to authorize emergency medical care if it became necessary. [The birth mother] had to miss a great deal of work she would not otherwise have had to miss. This situation caused additional stress and anxiety to [the parents], which would not have been necessary had [the spouse] been on the child's birth certificate.

Ruling on Petition for Judicial Review, *Gartner v. Iowa, Case* No.: CE 67807 (5th Jud. District of Iowa, Jan 4. 2012), *aff'd Gartner v. Iowa Dep't of Public Health*, 830 N.W.2d 335, 341-42 (Iowa 2013).[4] In another case, same-sex parents who did not have a birth certificate reflecting their child's parentage were "told by both an ambulance crew and emergency room personnel that only 'the mother' could accompany [the child] and thus initially faced a barrier to being with their child in a medical emergency." *Finstuen v. Crutcher*, 496 F.3d 1139, 1142, 1145 (10th Cir. 2007).

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[4] While in some states the biological mother could have authorized her spouse to make decisions on her behalf, that is not a burden shouldered by other couples who are provided with legally accurate birth certificates. In any event, such advance authorization may not be an option in emergencies.

B. Disability and Survivorship Benefits

If a parent is not listed on her child's birth certificate, it is much harder for that child to receive benefits under an array of laws protecting children in the event of parental death or disability.[5] The Social Security Administration ("SSA") requires that parents provide a child's birth certificate when applying for these benefits.[6] SSA also requires parents to produce a birth certificate before claiming their child as a dependent on a parent's Social Security retirement benefits.[7]

The U.S. Department of Veteran Affairs ("VA") likewise requires a birth certificate or comparable document to process claims when a veteran parent has died.[8] In a guidance document

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[5] *See* Social Security Administration, Benefits for Children (March 2016), *available at* https://www.ssa.gov/pubs/EN-05-10085.pdf ("Those dollars help to provide the necessities of life for family members and help make it possible for those children to complete high school. When a parent becomes disabled or dies, Social Security benefits help stabilize the family's financial future.").

[6] *Id.* (requiring "the child's birth certificate and the parent's and child's Social Security numbers.").

[7] *See* Social Security Administration, Retirement Benefits at 11 (January 2017), available at https://www.ssa.gov/pubs/EN-05-10035.pdf.

[8] *See Introduction*, U.S. Department of Veterans Affairs, *available at* https://www.va.gov/opa/publications/benefits_book/benefits_introduction.asp.

explaining how the VA would comply with this Court's decision in *Obergefell*, the VA reiterated that it would require couples to provide a birth certificate or judicial decree[9] to establish parentage when applying for benefits.[10]

The burden shouldered by families who lack a legally accurate birth certificate does not end with federal benefits. Birth certificates are typically required to claim a variety of state disability, unemployment, and survivorship benefits. To give just one example, states, including Arkansas, require a birth certificate as evidence of parentage for a child seeking certain public employee survivorship benefits. *See, e.g.*, Ark Code § 24-12-117(b).

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[9] A court decree of parentage or adoption is not an adequate substitute for a legally accurate birth certificate as a simple, readily available document that proves parentage. Adoption is a burdensome and expensive process that requires judicial approval. For many married same-sex couples – especially poorer ones – these additional costs and procedures may be an insurmountable barrier to obtaining access to benefits for their children. When a child is born to a married different-sex couple the parents are not required to shoulder these additional burdens for their parentage to be acknowledged in a legal document.

[10] *See Important Information on Marriage*, U.S. Department of Governmental Affairs, https://www.va.gov/opa/marriage/ (visited March 5, 2017).

C. Education

Evidence establishing a legal parent-child relationship is critical in the context of education as well as a variety of other programs ranging from after-school care to sports clubs. Parents must verify their parentage in order to register their child for school or daycare. And, critically, many schools rely on birth certificates as evidence of parentage. In Arkansas, for example, a birth certificate is required for a parent to enroll their child in certain school systems absent a court order.[11]

A parent not listed on her child's birth certificate will also face difficulties overseeing and staying updated on her child's education. One of the cases affirmed in *Obergefell* provides an example. There, one parent in a married same-sex couple was forced to execute a general power of attorney in favor of the other, who was not listed on the birth certificate, to enable the other parent to speak with their son's teacher and daycare workers. Brief of Appellant-Petitioner at 10, *Obergefell v. Hodges*, No. 14-556, 2015 U.S. S. Ct. Briefs LEXIS 806.

D. Identity

Families who lack legally accurate birth certificates will also face difficulties ensuring that

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[11] *See, e.g.*, Bentonville Public Schools, *Student Services Enrollment-Information*, https://bentonvillek12.org/web/parents/enrollment.asp (requiring a birth certificate for enrollment).

their children's other identity documents reflect and authorize the roles of both parents in the children's lives. SSA recommends that parents apply for their child's social security number as soon as possible after the child's birth.[12] Families who are unable to do so face a far more burdensome process.[13]

Two of the married plaintiffs in a recent Indiana case involving birth certificates conceived a daughter through artificial insemination. *Henderson v. Adams*, No. 1:15-cv-00220-TWP-MJD, 2016 U.S. Dist. LEXIS 180220, at *7-8 (S.D. Ind. Dec. 30, 2016) (appeal filed). The two mothers provided the information requested on the Indiana Birth Worksheet and listed their child's name as a hyphenated version of both of their last names. *Id.* at 8. Nonetheless, they were issued a birth certificate that listed only the birth mother and her last name. *Id.* Shortly thereafter, the parents received a new social security card that did not include the hyphenated name. *Id.*

The adverse financial and emotional consequences for the family were substantial. As the district court explained:

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[12] *See* Social Security Administration, Social Security Numbers for Children, https://www.ssa.gov/pubs/EN-05-10023.pdf (visited March 4, 2017) ("The easiest time to [apply] is when you give information for your child's birth certificate while you're still at the hospital. If you wait to apply for a number at a Social Security office, there may be delays while we verify your child's birth certificate.")

[13] *Id.*

> Because of this incident, [the unnamed parent] sought a stepparent adoption, which required her to undergo fingerprinting and a criminal background check in addition to submitting her driving record, her financial profile, and the veterinary records for any pet living in the home. A home study was required, which examines the relationship history of [the parents], requires them to write an autobiography and to discuss their parenting philosophy, and requires them to open their home for inspection. The cost ... was approximately $4,200.00. This same costly and time-consuming adoption process is not required of opposite-sex married couples who artificially conceive a child. Instead, the non-biological father who is married to the birth mother is listed on the birth certificate and recognized as the child's father.

Id. at *8-9.

E. Travel

Travel poses another set of difficulties for families who lack a correct birth certificate. Parents must submit legal proof of parental relationship, such as a birth certificate or a judicial decree, to

obtain a United States passport for their child.[14] One of the *Obergefell* couples encountered difficulties with the passport system. Because the parent who was not the birth mother was not named on the birth certificate, she was denied the right to apply for the child's passport. *See* Petitioner's Brief at 10, *Obergefell*, 135 S. Ct. 2584 (2015).

A parent not named on her child's birth certificate may also be stopped at the border when traveling internationally with the child. To prevent kidnappings, some countries require a single parent travelling with a child to produce proof of the parent's relationship with the child.[15] The State Department has issued a warning suggesting that parents travelling with their child carry documentation of their relationship.[16]

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[14] *See Children Under 16*, U.S. Dept. of State, U.S. Passports and Int'l Travel, https://travel.state.gov/content/passports/en/passports/under-16.html (visited March 4, 2017).

[15] *See, e.g., Minor Children traveling to Canada*, Government of Canada, http://www.cic.gc.ca/english/visit/minors.asp, (visited March 5, 2017) ("The parent should present: the child's passport a copy of the child's birth certificate, and a letter of authorization ... which is signed by the parent who is not travelling with them").

[16] *See Children – Child Traveling With One Parent or Someone Who is Not a Parent or Legal Guardian or a Group*, U.S. Customs & Border Protection https://help.cbp.gov/app/answers/detail/a_id/268/~/children---child-traveling-with-one-parent-or-someone-who-is-not-a-parent-or (visited March 4, 3017).

F. Dignity of the Parent-Child Bond

Arkansas's refusal to grant birth certificates recognizing the legal parentage of married same-sex couples "results in more than just material burdens." *See Obergefell*, 135 S. Ct. at 2601. It also burdens the dignity of the parent-child relationship.

A birth certificate "giv[es] recognition and legal structure to" the parent-child relationship, just as a marriage certificate does for a spousal relationship. *See id* at 2600. A birth certificate serves as a badge of "the integrity and closeness of [the] family and its concord with other families ...." *See id., quoting United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013). Access to a legally accurate birth certificate recognizing the child's family relationship also "affords the permanency and stability important to children's best interests." *See Obergefell*, 135 S. Ct. at 2600. It offers children "recognition, stability, and predictability." Without it, "children suffer the stigma of knowing their families are somehow lesser." *Id.* In short, Arkansas's refusal to provide birth certificates on equal terms to the children of married same-sex couples serves to "harm and humiliate" those children and their families. *Id.* at 2600-01.

III. THE COURT SHOULD GRANT CERTIORARI TO ENSURE THAT THE LOWER COURTS DO NOT FLOUT THIS COURT'S RULINGS IN *OBERGEFELL AND WINDSOR*.

Arkansas's birth certificate law provides benefits and recognition to children of married different-sex parents that the Arkansas Supreme Court has now withheld from married same-sex parents. The ruling below, acknowledging the rights of one class of married couples while denying those same rights to another, flouts this Court's rulings in *Obergefell* and *Windsor* and violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. By providing married different-sex couples birth certificates for their children that reflect the marital presumption of parentage and name both spouses as parents, while denying such documentation to married same-sex couples, Arkansas denies the same-sex parents and their children the security, stability, recognition, and dignity that birth certificates signify and provide.

In *Obergefell*, this Court ruled that "principles of liberty and equality" compelled the conclusion that same-sex couples may marry "on the same terms and conditions as opposite-sex couples," *id.* at 2604, with the same access to the myriad "governmental rights, benefits, and responsibilities" incident to marriage. *Id.* at 2601. It is impermissible for a state to "abridge central precepts of equality" by denying same-sex couples marriage and its attendant benefits. *Id.* at 2604. In illustrating the "constellation of benefits that the

States have linked to marriage," the Court explicitly included birth certificates. Id. At 2601. The Court also indicated that the reasons for its decision went beyond the concrete benefits of marriage: banning same-sex couples from the institution of marriage "works a grave and continuing harm" on same-sex couples that "disrespect[s] and subordinate[s] them." *Id.* at 2604.

Maintaining a different birth certificate regime for children born to married same-sex couples does exactly the same thing. It is precisely the kind of disrespect that cannot be justified under the Fourteenth Amendment because it wrongly denies married same-sex couples the "recognition, stability, and predictability" attendant upon marriage. It also causes instability that different-sex couples "would deem intolerable in their own lives." *Id.* at 2600, 2601, 2604.

As the Chief Justice of the Arkansas Supreme Court observed in his dissenting opinion, "The logical extension of *Obergefell*, mandated by the Due Process Clause and the Equal Protection Clause, is that a married same-sex couple is entitled to a birth certificate on the same basis as an opposite -sex married couple." *Smith v. Pavan*, 2016 Ark. 437, at *23 (2016). Indeed, no "extension" is required: two of the cases on review in *Obergefell* – *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014) *aff'd sub nom Obergefell*, 135 S. Ct. 2584 (2015) and *Henry v. Himes*, 14 F. Supp. 3d 1036 (S.D. Ohio 2014) *aff'd sub nom Obergefell*, 135 S. Ct. 2584 (2015) – revolved around equal access to birth certificates. In both cases, state laws precluded same-sex spouses

from being listed as parents on their children's birth certificates. By holding these state laws unconstitutional, *Obergefell* made clear that a state's rules regarding birth certificates, including the universal rule in the United States that spouses be listed on the birth certificate of a child born to a married woman, must be applied equally to all married couples.[17]

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[17] Multiple courts have correctly concluded that *Obergefell* requires states to treat married same-sex couples equally with other couples in the issuance of birth certificates. *See Henderson v. Adams*, 2016 WL 3548645 (S.D. Ind. June 30, 2016) (striking down Indiana's statutory scheme regarding birth certificates); *Marie v. Mosier*, 196 F. Supp. 3d 1202 (D. Kan. Jul. 22, 2016) (permanently enjoining Kansas from treating married same-sex couples differently from married different-sex couples under birth certificate statutes to "ensure that defendants fully comply with *Obergefell*'s broad holding"); *Roe v. Patton*, 2015 WL 4476734 (D. Utah Jul. 22, 2015) (issuing preliminary injunction prohibiting Utah from treating married same-sex couples differently from married different-sex couples under birth certificate statute in view of *Obergefell's* holding that "States must allow same-sex couples to marry 'on the same terms and conditions as opposite-sex couples'"); *Torres v. Seemeyer*, 2016 U.S. Dist. LEXIS 124736, (W.D. Wis. Sept. 14, 2016) (striking down Wisconsin's differential treatment of same-sex couples under the state birth certificate law); *Carson v. Heigel*, No. 3:16-0045-MGL, 2017 U.S. Dist. LEXIS 21104 (D.S.C. Feb. 15, 2017) (issuing declaratory judgment that failure to treat same-sex spouses in the same manner as different-sex spouses in the issuance of birth certificates violates the Fourteenth Amendment and granting summary judgment as to constitutional claims). Allowing the Arkansas ruling to stand otherwise could embolden other jurisdictions to disregard this Court's precedents in *Obergefell* and *Windsor*.

That "*Obergefell* did not address *Arkansas's* statutory framework regarding birth certificates" – the justification cited by the Arkansas Supreme Court (Pet. Br. App. at 11a) – does not give Arkansas license to evade the Court's ruling that the institution of marriage, and all its incident protections and benefits, must be accorded equally to all married couples.

Nor is *Obergefell* the only decision of this Court that the Arkansas ruling contumaciously disregards: the ruling below also contravenes the principles set forth in *United States v. Windsor*, 133 S. Ct. 2675 (2013). In *Windsor*, this Court struck down the Defense of Marriage Act ("DOMA"), a federal statute that denied all federal recognition of the marriages of same-sex couples. The denial deprived the plaintiffs of a host of federal benefits linked to marriage. The Court ruled that depriving married same-sex but not married different-sex couples of such benefits violated "basic due process and equal protection principles." 133 S. Ct. 2675, 2693, 2694 (2013). The Court stressed the "long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State." *Id.* at 2692; *accord Obergefell*, 135 S. Ct. at 2601.

In *Windsor*, the Court found that DOMA's effect was "to identify a subset of state-sanctioned marriages and make them unequal." 133 S. Ct. 2694. Arkansas's birth certificate law does exactly that. It results in the very deprivation of benefits and harm that *Windsor* forbade. By differentiating married same-sex couples from married different-sex

couples, Arkansas relegates same-sex marriages to a lower-tier status and "humiliates tens of thousands of children now being raised by same-sex couples." *Id.* Denying a same-sex parent the automatic right to be listed on her child's birth certificate but affording the right to different-sex parents "makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community ...." *Id.*

Arkansas's assertion that it must capture biological information on its birth certificates is rebutted by its own statutory scheme. As discussed above, in a variety of circumstances, Arkansas lists men who are not genetic parents on a child's birth certificate. This is true even in circumstances, like assisted reproduction, in which all parties know that he is not the child's genetic parent. Arkansas can point to no reason for prioritizing the collection of biological information uniquely for children of same-sex couples when other married couples have children using the same types of medical assistance that many same-sex couples use. Given the unequal application of this asserted interest, Arkansas's action serves only to "to disparage and to injure ...." *Windsor*, 133 S. Ct. at 2696. If Arkansas has an interest in capturing biological information, it can collect that biological information from all families

equally, without relegating some families to second-class status.[18]

Arkansas's unequal treatment of married same-sex couples is unconstitutional. *Amici* respectfully request that the Court grant certiorari to ensure that its precedents are respected. *See, e.g., V.L. v. E.L.*, 136 S. Ct. 1017 (2016) (per curiam) (granting certiorari and reversing Alabama Supreme Court's refusal to recognize adoption by same-sex parent); *Nitro Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) ("The Oklahoma Supreme Court's decision disregards this Court's precedents ...."); *Martinez v. Illinois*, 134 S. Ct. 2070, 2077 (2014) (per curiam) (summarily reversing state court decision that "runs directly counter to our precedents"); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam) (summarily reversing state court decision because it was "both incorrect and inconsistent with clear instruction in the precedents of this Court"); *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) ("It is this Court's prerogative alone to overrule one of its precedents."). Reversal will protect Arkansas children of married same-sex parents from being relegated to legal limbo and second-class status.

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[18] *See, e.g., Culliton v. Beth Isr. Deaconess Med. Ctr.*, 435 Mass. 285, 293-294 (2001) (distinguishing between information listed on a birth certificate, such as the identity of the "parents," and the variety of other information regarding pregnancies and births that registrars can collect and record for public health purposes).

CONCLUSION

For the foregoing reasons *amici* respectfully request that the Court grant the petition for certiorari and reverse the Arkansas Supreme Court.

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IN THE
Supreme Court of the United States

MARISA N. PAVAN, ET AL.,

Petitioners,

v.

NATHANIEL SMITH, M.D., MPH,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. AND GLBTQ LEGAL ADVOCATES & DEFENDERS, AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. AND GLBTQ ADVOCATES & DEFENDERS

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") and GLBTQ Advocates & Defenders ("GLAD") respectfully move for leave to file a brief as *amici curiae* in support of petitioners.

Counsel for proposed *amici* timely notified counsel of record for the parties of their intent to file this brief as required by this Court's Rule 37.2(a). Counsel for petitioners consented to the filing of this brief, and the letter of consent has been submitted to the Clerk of this Court.

Counsel for respondent "t[ook] no position on the filing of the brief," stating that "[i]t is [respondent's] policy to ask for a copy of the *amicus* brief before we decide whether we will consent or not." While respondent "d[id] not oppose" this brief and acknowledged that "[i]n nearly all cases, after we see a copy, we consent," respondent asserted that, absent reviewing the brief in advance, respondent could "[n]ot affirmatively consent because we have no way of knowing whether the brief meets the proper standards of *amicus* briefs." Proposed *amici* believe that respondent's demand to review the proposed brief in advance before respondent will consent to its filing is not appropriate. Among other things, satisfying respondent's requirement of providing an advance copy of the brief for respondent's review would have prejudiced the timing of drafting, printing, and filing of this brief, necessitating the filing of this motion.

Lambda Legal is the nation's oldest and largest legal organization whose mission is to achieve full recognition of the civil rights of lesbian, gay, bisexual, and transgender persons, and people living with HIV. GLAD works to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. Proposed *amici* seek leave to submit this brief in support of petitioners to explain why a state's refusal to issue birth certificates identifying the non-biological parent in married same-sex couples is a disturbing failure to comply with this Court's recent decisions in *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015), and *United States* v. *Windsor*, 133 S. Ct. 2675 (2013). Lambda Legal and GLAD have a strong interest in guaranteeing that married same-sex parents and their children receive the full range of protections afforded by marriage—and have a long history of presenting issues related to equal rights for same-sex couples to this Court, including participating as party counsel in *Obergefell* and *amici* in *Windsor*. Lambda Legal and GLAD have deep experience representing same-sex couples and their families in a range of legal matters and are well-situated to describe the importance of having both parents appear on a child's birth certificate.

Lambda Legal and GLAD therefore respectfully seek leave to file the attached brief as *amici curiae* in support of petitioners.

Respectfully submitted.

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal"), founded in 1973, is the nation's oldest and largest legal organization whose mission is to achieve full recognition of the civil rights of lesbian, gay, bisexual, and transgender persons, and people living with HIV, through impact litigation, education, and policy advocacy.

Through litigation, public policy advocacy, and education, *amicus curiae* GLBTQ Legal Advocates & Defenders ("GLAD") works to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation.

Amici submit this brief in support of petitioners to explain why a state's refusal to issue birth certificates identifying the non-biological parent in married same-sex couples is a disturbing failure to comply with this Court's recent decisions in *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015), and *United States* v. *Windsor*, 133 S. Ct. 2675 (2013), landmarks recognizing lesbian and gay couples' constitutional right to

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored any portion of this brief, and no person other than *amici* or its counsel or members made any monetary contribution intended to fund the preparation or submission of the brief. As explained in the accompanying motion, counsel of record for the parties received timely notice of *amici*'s intent to file this brief, but counsel for respondent took no position on the filing of this brief.

equality in marriage and to the protections that flow from marriage. The right of married same-sex parents to have their children's birth certificates accurately reflect parentage falls squarely within the constellation of benefits afforded through marriage, as recognized in *Obergefell*, 135 S. Ct. at 2601, is paramount to the full equality of married same-sex couples, and is important in their day-to-day lives.

Amici have a strong interest in guaranteeing that married same-sex parents and their children receive the full range of benefits afforded by marriage—and a long history of presenting issues related to equal rights for same-sex couples to this Court. Lambda Legal has participated as party counsel or *amicus* in numerous challenges to laws prohibiting same-sex couples from marrying or receiving legal respect for their existing marriages, including as party counsel in *Obergefell* and as *amicus* in *Windsor*. Lambda Legal also participated as party counsel in *Lawrence* v. *Texas*, 539 U.S. 558 (2003), and *Romer* v. *Evans*, 517 U.S. 620 (1996), other decisions in which this Court recognized lesbian and gay individuals' constitutional rights to liberty and equality. Lambda Legal has deep experience representing same-sex couples and their families in a range of legal matters and is well-situated to describe the importance of having both parents appear on a child's birth certificate. GLAD has litigated cases representing same-sex couples seeking the freedom to marry and respect for their marriages from states and the federal government, including on behalf of a Michigan couple in *Obergefell*. GLAD has also represented LGBT persons and families seeking equal

treatment in all manner of cases in state and federal courts.

SUMMARY OF ARGUMENT

I. Arkansas refuses to include the non-biological parent on the birth certificate of a child born to a married same-sex couple as the result of donor insemination—even though Arkansas generally *requires* non-biological parents to be included on such certificates if the couple consists of a man and a woman. The sanctioning of that state-sponsored discrimination by the Arkansas Supreme Court is irreconcilable with this Court's decisions in *Obergefell* and *Windsor*, which guarantee same-sex spouses the same protections afforded different-sex spouses. Unfortunately, the Arkansas Supreme Court is not alone in its disregard of this Court's marriage equality precedents, at the cost of married same-sex couples and their children. Review is therefore warranted.

II. Few documents are more significant to a married couple raising a child than the permanent and official record of their child's birth and parentage. Birth certificates play a pivotal role when parents seek to enroll their child in school, travel with their child, and make other critical decisions shaping their child's life. In refusing to give effect to *Obergefell* and *Windsor*, the decision below singles out married same-sex couples and their children and deprives them of the numerous tangible and intangible protections that birth certificates afford. These families once again are consigned to the "instability" different-sex families "would deem intolerable in their own lives"—the very instability that *Obergefell*

should have ended once and for all. 135 S. Ct. at 2602.

ARGUMENT

I. THE ARKANSAS SUPREME COURT'S DECISION FLATLY CONTRADICTS *OBERGEFELL* AND *WINDSOR*, SIGNALING TROUBLING ONGOING RESISTANCE TO AFFORDING SAME-SEX SPOUSES THE MARRIAGE RIGHTS THOSE DECISIONS UPHELD.

The U.S. Constitution prohibits the federal government and the states from placing "same-sex couples in an unstable position of being in a second-tier marriage." *Windsor*, 133 S. Ct. at 2694. As this Court held only two Terms ago, same-sex and different-sex spouses must receive equal access to all "aspects of marital status," including "birth ... certificates." *Obergefell*, 135 S. Ct. at 2601. In simplest terms, states must treat same-sex and different-sex spouses equally under the law. Yet the Arkansas Supreme Court refused to allow the wife of a woman who achieved pregnancy by anonymous donor insemination to appear on her child's birth certificate, even though Arkansas would list an identically situated husband on the birth certificate. The Court should step in now to reaffirm the central principle of *Obergefell* and *Windsor*: A marriage between a same-sex couple, with all the attendant protections, is legitimate, worthy, and—above all—*equal*.

The specific question at issue in this case—whether a state can refuse to name a same-sex spouse on a birth certificate, notwithstanding that the state would name a different-sex spouse in the same situation—was at the heart of the *Obergefell*

proceedings. For example, several of the couples whose case was consolidated in *Obergefell* "gave birth to children in Ohio and wish[ed] to have both of their names listed on each child's birth certificate rather than just the child's biological mother." *DeBoer* v. *Snyder*, 772 F.3d 388, 398 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584. Just like the couples here, those couples achieved pregnancy via anonymous donor insemination and sought to name the non-biologically related spouses on their children's respective birth certificates. Brief for Petitioners 8-9 & n.1, *Obergefell* (No. 14-556), 2015 WL 860738. The *Obergefell* petitioners argued that Ohio's refusal to name both parents on the birth certificates "place[d] same-sex couples in Ohio and beyond 'in an unstable position of being in a second-tier marriage,' and '[made] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.'" *Id.* at 27 (quoting *Windsor*, 133 S. Ct. at 2694). As the petitioners explained, "[t]he bans make it impossible for the ... Petitioners to obtain accurate birth certificates for their children ... or for Petitioners to receive a myriad of other protections the government guarantees married couples and their families through all other phases of life." Reply Brief for Petitioners 14, *Obergefell* (No. 14-556), 2015 WL 1776076.

This Court agreed that petitioners were entitled to appear on their children's birth certificates. As Justice Danielson correctly observed in his dissent in the present case, "the United States Supreme Court held in *Obergefell* that states are not free to deny same-sex couples 'the constellation of benefits that

the States have linked to marriage'" and "the Court listed 'birth and death certificates' specifically as one of those benefits attached to marital status"; therefore, Arkansas cannot treat same- and different-sex spouses disparately in this regard. Pet. App. 43a (quoting *Obergefell*, 135 S. Ct. at 2601). The *Obergefell* dissents agreed that this was the effect of *Obergefell*. Chief Justice Roberts's principal dissent, joined by Justices Scalia and Thomas, acknowledged that "petitioners ... seek public recognition of their relationships, *along with corresponding government benefits*." *Obergefell*, 135 S. Ct. at 2620 (Roberts, C.J., dissenting) (emphasis added). Justice Alito similarly noted that he "use[d] the phrase 'recognize marriage' as shorthand for issuing marriage licenses *and conferring those special benefits and obligations provided under state law for married persons*." *Id.* at 2640 n.1 (Alito, J., dissenting) (emphasis added). Indeed, Arkansas itself, as an *amicus* in *Obergefell*, argued that marriage "ripple[s] across vital areas of law, including the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.' One could add to that list laws regulating adoption ... [and] reproductive technology." Brief for Louisiana *et al.* as *Amici Curiae* Supporting Respondents 7, *Obergefell* (No. 14-556), 2015 WL 1608213 (internal citation omitted). Even the Arkansas Supreme Court majority in the present case acknowledged that *Obergefell* recognizes birth certificates as one of the "conferred benefits on married couples." Pet. App. 12a.

Given that *Obergefell* held that states must provide the full "constellation of benefits" to married same-sex couples and their families, including "birth

... certificates," 135 S. Ct. at 2601, Arkansas and every other state should have promptly applied marital presumptions of parentage on the same terms to married same- and different-sex parent couples alike and issued two-parent birth certificates to married same-sex parents without question. Yet Arkansas, as well as a number of other states resistant to *Obergefell*'s constitutional decree, have forced same-sex couples to litigate their right to accurate birth certificates, perpetuating the burdens on their families that *Obergefell* should have eliminated.

Thus far, the federal courts hearing these cases have faithfully followed *Obergefell*, uniformly ruling that states may not refuse to name a same-sex spouse on a birth certificate. *See, e.g.*, *Carson* v. *Heigel*, No. 3:16-cv-45, 2017 WL 624803, at *2 (D.S.C. Feb. 15, 2017) ("[T]his Court refuses to countenance Defendant's refusal to name both Plaintiffs on their twins' birth certificates. Defendant's present practice is violative of Plaintiffs' fundamental right to marriage and other protected liberties."); *Henderson* v. *Adams*, __ F. Supp. 3d __, 2016 WL 3548645, at *16 (S.D. Ind. June 30, 2016) ("The State Defendant and its officers ... are ENJOINED to recognize the Plaintiff Spouses in this matter as a parent to their respective Plaintiff Child and to identify both Plaintiff Spouses as parents on their respective Plaintiff Child's birth certificate."), *appeal docketed*, No. 17-1141 (7th Cir. Jan. 20, 2017); *Brenner* v. *Scott*, No. 4:14-cv-107, 2016 WL 3561754, at *3 (N.D. Fla. Mar. 30, 2016) ("[I]n circumstances in which the Surgeon General lists on a birth certificate an opposite-sex spouse who is not a biological parent, the Surgeon General must list a same-sex spouse who is not a bio-

logical parent."); *Roe* v. *Patton*, No. 2:15-cv-523, 2015 WL 4476734, at *4 (D. Utah July 22, 2015) ("Defendants are enjoined from enforcing Utah [law] ... in a way that differentiates between male spouses of women who give birth through assisted reproduction with donor sperm and similarly situated female spouses of women who give birth through assisted reproduction with donor sperm."); *Robicheaux* v. *Caldwell*, No. 13-cv-5090, 2015 WL 4090353, at *2 (E.D. La. July 2, 2015) (Defendant "must issue forthwith a birth certificate for the child of Plaintiff M. Lauren Brettner identifying Jacqueline M. Brettner as one of the child's parents.").

Like these federal courts, the Arkansas Supreme Court was required to follow *Obergefell*. "As Justice Story explained 200 years ago, if state courts were permitted to disregard this Court's rulings on federal law, 'the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable.'" *James* v. *City of Boise, Idaho*, 136 S. Ct. 685, 686 (2016) (per curiam) (quoting *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816)).

Yet the Arkansas Supreme Court allowed its state to give preferential treatment to different-sex spouses and to list husbands who are not biologically related to the child—but not similarly-situated wives—on the child's birth certificate. Pet. App. 20a. Although the court recognized that *Obergefell* involved consideration of birth certificates, the court deemed this irrelevant because *Obergefell* "men-

tioned birth certificates only once." Pet. App. 11a-12a. The Arkansas Supreme Court then rejected petitioners' challenge because "[t]he purpose of the statutes is to truthfully record the nexus of the biological mother and the biological father to the child," Pet. App. 20a—even though the state generally requires a woman's husband to appear on the birth certificate of a child conceived through use of an anonymous sperm donor, Ark. Code §§ 9-10-201(b), 20-18-401(f)(1); generally requires a woman "intended to be the mother" to be listed on the birth certificate when a heterosexual married couple uses an egg donor and a surrogate, *id.* § 9-10-201(b)(1); and issues a second birth certificate listing the names of parents who adopt a child, *id.* § 20-18-406(a)(1). The claim that birth certificates are limited to a record of a child's biological parents is thus belied by the multiple circumstances in which the state records non-biological parents on birth certificates. The bottom line is that "[t]he exclusion of the nonbirthing spouse on the birth certificate of a child born to a married lesbian couple is not substantially related to the objective of establishing parentage." *Gartner* v. *Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 353-54 (Iowa 2013).

Windsor and *Obergefell* considered and rejected this same appeal to "biology" as a shield for discrimination against same-sex couples and their children. The respondent's unsuccessful brief in *Windsor* attempted to justify denial of federal recognition to marriages of same-sex spouses based on the contention that "the biological link of parents to children [is] deserving of special recognition and protection." Brief for Respondent BLAG 18, *Windsor* (No. 12-

307), 2013 WL 267026 (quoting *Windsor* v. *United States*, 699 F.3d 169, 206 (2d Cir. 2012) (Straub, J., dissenting), *aff'd*, 133 S. Ct. 2675). This argument did not succeed then, and it should not succeed now. *Windsor*, 133 S. Ct. at 2695-96. The same reasoning was resurrected in *Obergefell* and rejected yet again by this Court. *See, e.g.*, Brief for Respondents 39-40, *Tanco* v. *Haslam* (No. 14-562), *subsequently consolidated with Obergefell*, 2015 WL 1384102 ("Obviously, same-sex couples cannot procreate naturally. Biology alone, therefore, provides a rational explanation for not expanding marriage to add same-sex couples."); *see also Obergefell*, 135 S. Ct. at 2600-01. This Court emphasized in *Obergefell* that the right to marry is fundamental in part because "it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education," and that these "varied rights" must be understood "as a unified whole." *Id.* at 2600. The Arkansas Supreme Court's attempt to divorce licensing marriage for same-sex couples from recognition of the parental rights that flow from the marriage ignores that these rights form "a unified whole" that must be protected on equal terms for same- and different-sex couples. "Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser." *Id.* at 2600. They are denied the "equal dignity in the eyes of the law" that the Constitution guarantees same-sex couples and their families. *Id.* at 2608.

Unfortunately, the state of Arkansas and its Supreme Court are not alone in their continuing resistance to this Court's holding in *Obergefell*. This

Court should enforce the principle of marriage equality before further impermissible limitations take hold.

On January 20, 2017, the Texas Supreme Court, on rehearing, granted review of *Parker* v. *Pidgeon*, 477 S.W.3d 353 (Tex. App. 2015) (per curiam), in which the Texas Court of Appeals had vacated a temporary injunction prohibiting the City of Houston from offering spousal benefits to same-sex spouses of City employees and remanded for further consideration in light of *Obergefell*. In doing so, the court noted *Obergefell* effected a substantial change in the law regarding recognition of marriage between same-sex couples and that "'there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.'" *Id.* at 354 (quoting *Obergefell*, 135 S. Ct. at 2607-08). The Texas Supreme Court had initially denied the petition for review over a dissent by Justice Devine; however, after the Arkansas Supreme Court's decision in this case was released, the Texas court changed its mind, siding with Justice Devine on the decision to accept review. *Pidgeon* v. *Turner*, __ S.W.3d __, 2016 WL 4938006 (Tex. Sept. 2, 2016) (mem.), *reh'g granted*, No. 15-688 (Tex. Jan. 20, 2017). Justice Devine's dissent from the original denial is grounds for concern: Like the Arkansas Supreme Court, it relies on a crabbed interpretation of *Obergefell* and on discredited biology-based justifications for discrimination. According to Justice Devine, "at most, the majority" in *Obergefell* "merely *described* the benefits that states confer on married couples and *assumed* states would extend them to all married couples. Generalized assump-

tions about state laws do not constitute a legal holding." *Id.* at *3. Relying on reasoning rejected by this Court in both *Windsor* and *Obergefell*, he then asserted: "[T]hat only opposite-sex couples may procreate justifies limiting government incentives and security for childbearing to spouses of the opposite sex. ... By misapplying *Obergefell*, the court of appeals overlooked this legitimate and important interest." *Id.* at *5. Oral argument in *Pidgeon* occurred on March 1, 2017, and same-sex spouses and their families in Texas anxiously wait to learn whether the Texas Supreme Court will open a door to depriving them of spousal benefits afforded different-sex couples.

Judges in Alabama and Puerto Rico have also tried to ignore or limit *Obergefell*, although their efforts were ultimately corrected as the cases proceeded. In the months after *Obergefell*, Chief Justice Moore of the Alabama Supreme Court unilaterally issued an administrative order directing all probate judges to deny marriage licenses to same-sex couples.[2] *See In re Moore*, No. 46, 2016 WL 7106075, at *5 (Ala. Jud. Inq. Comm. July 15, 2016). He refused to apply *Obergefell* to Alabama's ban on marriage for same-sex couples because "[t]he *Obergefell* opinion, being manifestly absurd and unjust and contrary to reason and divine law, is not entitled to precedential

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[2] This Court is familiar with the Alabama Supreme Court's resistance to recognizing rights of same-sex couples. *See Ex parte E.L.*, __ So. 3d __, 2015 WL 5511249 (Ala. Sept. 18, 2015), *rev'd sub nom.*, *V.L.* v. *E.L.*, 136 S. Ct. 1017 (2016) (per curiam) (holding that Alabama must give full faith and credit to Georgia state-court judgment permitting a woman to be the adoptive parent of children born to her same-sex partner).

value." *Ex parte State ex rel. Ala. Policy Inst.*, 200 So. 3d 495, 589 (Ala. 2016) (Moore, C.J., concurring). The Alabama Court of the Judiciary suspended the Chief Justice for his defiance, defusing that effort to disobey *Obergefell*. *Moore*, 2016 WL 7106075, at *31. Similarly, in *Conde Vidal* v. *Garcia-Padilla*, a district court refused to apply *Obergefell* to invalidate Puerto Rico's marriage ban, instead contending that the plaintiffs' fundamental right to marry had not been incorporated to Puerto Rico. 167 F. Supp. 3d 279, 287 (D.P.R. 2016). The First Circuit granted a writ of mandamus and criticized the court for a ruling that "errs in so many respects that it is hard to know where to begin." *In re Conde Vidal*, 818 F.3d 765, 766-67 (1st Cir. 2016).

State legislators have also proposed bills purporting to overrule *Obergefell*. Bills in South Carolina and Tennessee attempt to declare, by statute, that "[n]atural marriage between one man and one woman as recognized by the people of this State remains the law in South Carolina [or Tennessee], regardless of any court decision to the contrary" and "[a] court decision purporting to strike down natural marriage, including *Obergefell* ... is unauthoritative, void, and of no effect."[3] The Michigan Legislature introduced a resolution that "urge[s] the Governor and all executive officers in the state of Michigan to uphold their oaths of office and re-claim this state's sovereignty by not recognizing or enforcing the Unit-

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[3] H.B. 4513 § 2, 121st Leg., 2d Reg. Sess. (S.C. 2015); *accord* H.B. 892 § 1, 110th Leg., 1st Reg. Sess. (Tenn. 2017); S.B. 752 § 1, 110th Leg., 1st Reg. Sess. (Tenn. 2017).

ed States Supreme Court's *Obergefell* decision as a rule of law."[4]

The present case is both a manifestation of recent resistance to this Court's marriage equality decisions and the continuation of a long history of discrimination against same-sex couples. Although most states have seen faithful, orderly application of *Obergefell*, just two Terms after the Court's ruling, a troubling "history of resistance" to the Court's orders on marriage equality persists. *Brenner*, 2016 WL 3561754, at *3; *see also Moore*, 2016 WL 7106075, at *29 (recognizing "an aggressive public relations campaign about 'standing up to the federal judiciary'" in the wake of the marriage equality decisions). Only this Court can restore uniformity and certainty to this critically important area of constitutional law. The Arkansas Supreme Court should not be allowed to ignore the holding of *Obergefell* and deny same-sex spouses and their children legal recognition afforded to identically situated different-sex spouses and their children. Same-sex couples and their families need the Court's protection to ensure that they are afforded equal dignity and equal rights.

II. TWO-PARENT BIRTH CERTIFICATES ARE CRITICALLY IMPORTANT TO SAME-SEX PARENTS AND THEIR CHILDREN.

Few documents are more significant to a married couple raising a child than the permanent and official record of their child's existence. Birth certificates establish citizenship and provide legal identity, grant access to government benefits, and, perhaps

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[4] H.C. Res. 17, 98th Leg., Reg. Sess. (Mich. 2015).

most importantly, serve as proof of a child's relationship to her parents. In refusing to apply *Obergefell* and *Windsor*, the decision below singles out married same-sex couples and their children for the burdens of state-sponsored discrimination.

Birth certificates convey an array of practical benefits that affect every American's day-to-day life. Identification on a child's birth certificate "is the basic currency by which parents can freely exercise ... protected parental rights and responsibilities." *Henry* v. *Himes*, 14 F. Supp. 3d 1036, 1050 (S.D. Ohio 2014), *rev'd sub nom. DeBoer*, 772 F.3d 388, *rev'd sub nom. Obergefell*, 135 S. Ct. 2584. It is "the only common governmentally-conferred, uniformly-recognized, readily-accepted record that establishes identity, parentage, and citizenship." *Ibid.* When parents "make important decisions for a child," no other document is "as convenient as, or less likely to result in bureaucratic delays than a birth certificate." *In re C.R.O.*, No. CN10-02-06tn, 2012 WL 7989408, at *6 (Del. Fam. Ct. Dec. 17, 2012); *cf. Delgado* v. *Osuna*, 837 F.3d 571, 581 (5th Cir. 2016) (noting that birth certificates are among the "most important documents" that an individual has). Birth certificates are critical to:

- "registering the child in school" and extracurricular activities, *Henry*, 14 F. Supp. 3d at 1050;
- "determining the parents' (and child's) right to make medical decisions at critical moments,"

ibid., and accessing and verifying hospital and other medical records;[5]

- establishing a child's identity to law enforcement in the event the child goes missing or is kidnapped;
- "obtaining a social security card for the child," *ibid.*;[6]
- "establishing a legal parent-child relationship for inheritance purposes in the event of a parent's death," and "obtaining social security survivor benefits for the child in the event of a parent's death," *ibid.*;[7]
- obtaining child support in the event of the parents' separation;
- setting up a bank or other financial account in the child's name;
- "claiming the child as a dependent on the parent's insurance plan," *ibid.*;
- "claiming the child as a dependent" for state-income tax purposes, *ibid.*; and

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[5] *See* U.S. Dep't of Health & Human Servs., *Personal Representatives*, http://bit.ly/2lEqqtP (last visited Mar. 13, 2017).

[6] *See* Social Security Administration, *Learn What Documents You Need to Get a Social Security Card*, http://bit.ly/1Vh1Yu7 (last visited Mar. 13, 2017).

[7] *See* Social Security Administration, *Benefits for Children* (2016), http://bit.ly/2l6zUef.

- "obtaining a passport for the child,"[8] and traveling internationally without the encumbrance of additional documentation, *ibid.*[9]

When a state refuses to permit a same-sex spouse to appear on her child's birth certificate, the child is "denied the security of two legal parents," as well as all the protections that follow. *Patton*, 2015 WL 4476734, at *4. The state's refusal to list both parents on a child's birth certificate may have serious consequences for the child's safety and security: "In the case when a sole parent listed on a birth certificate is not available in an emergency, any number of difficulties or delays in being able to verify the other parent's legal status may place a child at risk." *C.R.O.*, 2012 WL 7989408, at *6. Even where the child's birth certificate can later be made accurate through costly and time-consuming adoption proceedings, these burdens on same-sex parents and their children—and the uncertainty the families must suffer in the interim—are intolerable.

Beyond the practical benefits birth certificates confer, permitting states to target same-sex couples and their children for unequal treatment is an affront to those families' dignity. *See Obergefell*, 135 S. Ct. at 2608. Children without accurate birth certificates will be subject to repeated challenges to their identity and will need repeatedly to explain why the

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[8] *See* U.S. Dep't of State, *Children Under 16*, http://bit.ly/2fWaluY (last visited Mar. 13, 2017).

[9] *See* U.S. Customs & Border Protection, *Children – Child Traveling with One Parent or Someone Who Is Not a Parent or Legal Guardian or a Group* (Feb. 2, 2017), http://bit.ly/2kXYjBD.

document recording their parentage is incomplete. The state's denial of accurate birth certificates to these children on the basis that their parents are a married same-sex couple stigmatizes the children and parents alike, sending a message that their family is less worthy of the state's recognition, "thus harm[ing] and humiliat[ing] the children of same-sex couples." *Id.* at 2600-01. Arkansas "makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694. The result: married same-sex couples' children are forced to "suffer the stigma" of believing "their families are somehow lesser." *Obergefell*, 135 S. Ct. at 2600.

These families are *not* lesser. They only "ask for equal dignity in the eyes of the law," which "[t]he Constitution grants them." *Obergefell*, 135 S. Ct. at 2608. This Court's review is necessary to ensure that these same-sex parents and their children are no longer saddled with the tangible and intangible burdens from efforts to relegate them to "second-tier marriage." *Windsor*, 133 S. Ct. at 2694.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted.

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